2018-2136

IN THE 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

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BRIEF FOR RESPONDENT-APPELLEE

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December 19, 2018

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STATEMENT OF COUNSEL

Pursuant to Rule 47.5, respondent-appellee's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Respondent-appellee's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

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

v.

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STATEMENT OF THE ISSUES

1. Whether Mr. Francway raises a challenge to the interpretation of the presumption of competency, which would grant this Court jurisdiction to entertain his appeal.

2. Alternatively, whether the United States Court of Appeals for Veterans Claims (Veterans Court) properly affirmed the decision of the Board of Veterans' Appeals (board) when the Veterans Court found that Mr. Francway failed to demonstrate prejudicial error resulting from the board's determination that the Department of Veterans Affairs (VA) substantially complied with a board remand order.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

Claimant-appellant, Ernest L. Francway, Jr., appeals the decision of the Veterans Court in *Ernest L. Francway, Jr. v. David M. Shulkin, M.D., Secretary of Veterans Affairs*, No. 16-3738 (Vet. App. Feb. 6, 2018), affirming the October 13, 2016 board decision denying entitlement to service connection for a low back disability.

I. Mr. Francway's Military Service And Initial Proceedings Before VA

Mr. Francway served in the United States Navy from August 1968 to May 1970. Appx1. On December 9, 1969, Mr. Francway received treatment for reported low back pain on the right side. *Id*. He was given medication, instructed to treat his back with warm soaks, and asked to return later in the morning. *Id*. When Mr. Francway reported back that day, an examination revealed limited range of motion without pain, no deformity, negative test for fracture, and some pain on rotation. *Id*. Mr. Francway was seen again for low back pain on the next day, when he reported that the symptoms had first begin on November 19, 1969 when he was involved in a motor vehicle accident. Appx2.

In 1978, a medical examination for the U.S. Naval Reserve revealed a normal back. *Id*. Mr. Francway reported other ailments at that time, but denied currently having or having had any recurrent back pain. *Id*. He also reported that he had been hospitalized after a motorcycle accident in 1976. *Id*. In March 1995,

in a non-VA medical examination, Mr. Francway reported back pain which started after he lifted weights. *Id.* In an October 2002 VA examination, Mr. Francway reported shoulder and hand ailments, and denied any other physical complaints. *Id*.

In April 2003, Mr. Francway filed multiple claims for VA benefits, including entitlement to disability compensation for a back injury sustained in 1969. Appx2. A VA regional office denied his entitlement to disability compensation for a back condition in May 2003. *Id*. Mr. Francway requested reopening of his claims in June 2003, and the regional office confirmed the prior decision denying compensation in January 2004. *Id*. Mr. Francway appealed. *Id*.

II. The Board Decision

In an October 2005 hearing before the board, Mr. Francway testified that he had injured his back on a flight deck when a gust of wind knocked him over and he fell onto the chocks and injured his abdomen. Appx2. He testified that he was diagnosed in service with a muscle strain and that he was also assigned to light duty for 3 months. *Id*. Mr. Francway denied receiving any treatment for his back after service until he got a muscle cramp in 2004. Appx2-3. The board remanded his claim for further development. *Id*.

On remand, Mr. Francway received medical opinions from three different medical professionals – an orthopedist, an internist, and a physician's assistant. A

VA orthopedist examined Mr. Francway in May 2006, 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 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 Veterans Court.

III. The Veterans Court Decision

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. Appx10. 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*. The Veterans Court continued that Mr. Francway's "arguments are undeveloped or lacking support in legal authority and therefore do not satisfy his burden of persuasion on appeal to show [b]oard error." *Id*. Nor did Mr. Francway "meet his burden of demonstrating that the Board committed prejudicial error." Appx11 (citing *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)).

IV. Mr. Francway's *En Banc* Hearing Petition

Mr. Francway appealed to this Court and moved for hearing *en banc* on October 3, 2018. ECF No. 14. This Court invited a response, and the Secretary responded on November 7, 2018. ECF No. 26. This Court denied the petition for hearing *en banc* in a *per curiam* order on November 28, 2018. ECF No. 30.

SUMMARY OF THE ARGUMENT

Following this Court's denial of Mr. Francway's petition for *en banc* hearing, the only live issue on appeal is Mr. Francway's contention that the Veterans Court improperly expanded the presumption of competency when denying an argument that the board failed to ensure substantial compliance with its

remand order. The Court should dismiss this appeal for a lack of jurisdiction.[1]

Although Mr. Francway asserts that this Court possesses jurisdiction over his appeal because the Veterans Court "transformed" the presumption of competency, the Veterans Court neither transformed nor interpreted the presumption – nor was it required to do so to reach its decision. Rather, the remaining underlying issue in this appeal is Mr. Francway's disagreement with factual findings – whether the VA substantially complied with the board's remand order, which is a matter beyond this Court's jurisdiction. Accordingly, this Court should dismiss Mr. Francway's appeal.

Even if this Court determines it possesses jurisdiction to entertain this appeal, it should nevertheless affirm the Veterans Court's decision. First, even assuming that the Veterans Court interpreted the presumption of competency, which the record belies, Mr. Francway's assertion that the court "transformed" the presumption fails because it is based upon a misunderstanding of the breadth of the presumption. The presumption permits the Veterans Court to presume that the VA has properly selected a medical examiner who "is qualified by training, education, or experience in the particular field" to provide a medical opinion. *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013)). The presumption thus applies to

[1] Mr. Francway's opening brief, filed prior to this Court's denial of his petition for hearing *en banc*, requests that this Court hear this appeal *en banc* is a near-reprint of the argument in his petition for hearing *en banc*. Mr. Francway presents no reason for the Court to reconsider the denial of its *en banc* request.

whether the individual is an appropriate medical specialist to provide a medical opinion.

Second, there is no merit to Mr. Francway's derivative argument that the Veterans Court erred when finding he waived any challenge to whether the internist qualified as an appropriate medical specialist under the remand order. In addition to being a question of fact over which this Court does not possess jurisdiction, Mr. Francway's argument is flawed because the record shows that he challenged only the adequacy of the internist's opinion before the board, not her qualifications to provide an opinion.

Third, Mr. Francway's argument that the Veterans Court erred when finding he failed in his burden of demonstrating prejudicial error also lacks merit. Mr. Francway contends that the Veterans Court inappropriately shifted the burden to require him to establish that the internist was not an appropriate medical specialist. Mr. Francway, however, does not identify a shift in burdens, but rather the Veterans Court's application of the principle that an appellant bears the burden of persuasion on appeals to the Veterans Court to demonstrate prejudicial error.

Accordingly, we respectfully request that the Court dismiss the appeal or, in the alternative, affirm the decision of the Veterans Court.

ARGUMENT

I. Jurisdiction And Standards Of Review

"This [C]ourt's jurisdiction to review decisions by the Veterans Court is limited." *Wanless v. Shinseki*, 618 F.3d 1333, 1336 (Fed. Cir. 2010). Pursuant to 38 U.S.C. § 7292(a), this Court may review a Veterans Court decision "with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation . . . or any interpretation thereof . . . that was relied on by the Court in making the decision." It may not, however, "review the Veterans Court's factual findings or its application of law to facts absent a constitutional issue." *Singleton v. Shinseki*, 659 F.3d 1332, 1334 (Fed. Cir. 2011) (citing 38 U.S.C. § 7292). This Court has consistently applied section 7292 strictly to bar fact-based appeals of Veterans Court decisions. *See, e.g., Conway v. Principi*, 353 F.3d 1369, 1372 (Fed. Cir. 2004) (noting that the Federal Circuit reviews only questions of law and cannot review any application of law to fact); *see also Madden v. Gober*, 125 F.3d 1477, 1480 (Fed. Cir. 1997), *Andre v. Principi*, 301 F.3d 1354, 1363 (Fed. Cir. 2002).

In reviewing a Veterans Court decision, this Court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions," and set aside any interpretation thereof "other than a determination as to a factual matter" relied upon by the Veterans Court that it finds to be: "(A) arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." 38 U.S.C. § 7292(d)(1). The Court reviews questions of statutory and regulatory interpretation *de novo*. *See Mayfield v. Nicholson*, 499 F.3d 1317, 1321 (Fed. Cir. 2007).

II. The Underlying Issue In Mr. Francway's Appeal Is His Disagreement With Factual Findings

Although Mr. Francway characterizes this appeal as a challenge to the alleged "transform[ation]" of the presumption of competency, *see* Applnt. Br. 31, the Veterans Court neither transformed nor interpreted the presumption – nor was it required to do so to reach its decision. Rather, the underlying issue in this appeal is Mr. Francway's disagreement with factual findings – whether the VA substantially complied with the board's remand order, which is a matter beyond this Court's jurisdiction. *See* 38 U.S.C. § 7292(d)(2); *Conway*, 353 F.3d at 1372.

Below, Mr. Francway alleged 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 VA selected a competent examiner. Rather, the court denied Mr. Francway's challenge to the

board's determination regarding substantial compliance with the remand order. Appx9-11. 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. Appx10.

On appeal, Mr. Francway continues this challenge under the guise of an alleged transformation of the presumption of competency. He contends that the Veterans Court expanded the presumption of competency to presume that the internist was a "specialist," when the presumption only permitted the court to presume that the internist was a "competent healthcare provider." Applnt. Br. 32. The Court does not possess jurisdiction to entertain this issue.

First, the Veterans Court's decision contains no interpretation of the presumption of competency, let alone an expansion of the presumption. Rather, the Veterans Court simply quoted this Court's description of the presumption in *Parks v. Shinseki* when finding that Mr. Francway waived his challenge:

> Initially, the Court notes that "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)), and the appellant does not argue, nor does the record reflect, that he raised this issue below.

Appx9. The Veterans Court did not explicitly or implicitly transform the presumption, but rather held that Mr. Francway failed to raise a challenge to the VA's selection of the internist before the board. Because this Court possesses jurisdiction to review only those decisions actually made by the lower court, this appeal of a non-existent interpretation should be dismissed. *See* 38 U.S.C. § 7292(a); *Jeneric/Pentron, Inc. v. Dillon Co., Inc.*, 205 F.3d 1377, 1384 (Fed. Cir. 2000) ("Because the district court did not conduct an equivalents analysis, this court need not purport to review a decision not made.").

Second, the crux of Mr. Francway's dispute is that, when the VA assigned an internist to the claim, it did not substantially comply with the board's remand order. Thus, Mr. Francway contends that the Veterans Court erred when affirming the board's decision. However, the adequacy of the VA's compliance with a board remand order for further medical examination is a factual matter and outside this Court's jurisdiction. *Dyment v. Principi*, 287 F.3d 1377, 1381 (Fed. Cir. 2002) (finding no jurisdiction to address veteran's argument that a VA medical specialist failed to comply with a board remand order because the argument constituted a challenge to the Veterans Court's decision on factual matter); 38 U.S.C. § 7292(a), (d)(2). Accordingly, although Mr. Francway frames his challenge as a legal issue in this appeal – the Veterans Court's transformation of the presumption of competency for medical examiners – the real dispute is over whether the VA

substantially complied with the board's remand order. *See Helfer v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999) (stating that, when determining whether it has jurisdiction to entertain an appeal, this Court looks to the substance of the issue presented rather than a party's characterization of the questions presented). This is a factual matter over which this Court does not possess jurisdiction. *Dyment*, 287 F.3d at 1381.

Third, Mr. Francway's opening brief raises two derivative arguments, which also do not fall within this Court's jurisdiction. As we detail above, in rejecting Mr. Francway's argument that the board failed to ensure substantial compliance with its remand order, the Veterans Court explained that "the appellant does not argue, nor does the record reflect, that he raised this issue below." Appx9. On appeal, Mr. Francway argues that the Veterans Court was "wrong" when it reached this determination, because his challenge before the board was "broad enough to encompass the more specific argument" regarding the medical examiner's qualifications. Applnt. Br. 34-35. Mr. Francway thus challenges the Veterans Court's consideration of the record evidence, which appears to present either a factual matter or an application of law to fact, over which this Court does not possess jurisdiction. 38 U.S.C. § 7292(d); *Cf Bonner v. Nicholson*, 497 F.3d 1323, 1328 (Fed. Cir. 2007) (the interpretation of a claim is essentially a factual inquiry that is beyond this Court's jurisdiction). We recognize that the Court has addressed

similar arguments by resorting to a review of record evidence, *see, e.g.*, *Parks*, 716 F.3d at 586, but, ultimately, this type of question does fall outside of this Court's jurisdiction.

Mr. Francway also contests the Veterans Court's determination that he failed to meet his burden of demonstrating that the board committed prejudicial error, which is a matter beyond this Court's jurisdiction. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) (explaining that 38 U.S.C. § 7292(d)(2) precludes appellate review of factual matters and the application of law to facts and therefore prevents this Court from reviewing contentions regarding actual prejudice). As we detail above, the Veterans Court alternatively held that "even assuming" Mr. Francway was not precluded from raising a presumption of competency issue for the first time on appeal, he failed to demonstrate prejudicial error because he failed to explain why an internist may not qualify as "an appropriate medical specialist." Appx10. The Veterans Court's determination that Mr. Francway failed to demonstrate prejudicial error did not depend on, or reflect a transformation of, the presumption of competency. Rather, the Veterans Court's decision was an application of the principle that an appellant bears the burden of persuasion on appeals to the Veterans Court to demonstrate prejudicial error. *See Sanders*, 556 U.S. at 409; Appx10-11 (citing *Sanders*, 556 U.S. at 409). This

Court does not possess jurisdiction to entertain this prejudicial error determination. *See Newhouse*, 497 F.3d at 1302.

In sum, although Mr. Francway frames his challenge as a legal issue in this appeal, the Veterans Court decision contains no transformation of the presumption of competency, and the genuine dispute is over whether the VA substantially complied with the board's remand order. Thus, following this Court's denial of *en banc* consideration for this appeal, the remaining issues are matters of fact or application of law to fact over which this Court does not possess jurisdiction.

III. The Veterans Court Did Not Transform The Presumption Of Competency And Instead Correctly Affirmed The Board's Decision

If this Court determines it possesses jurisdiction to entertain this appeal, this Court should nevertheless affirm the Veterans Court's decision. The only issues remaining following this Court's denial of Mr. Francway's *en banc* hearing petition is whether the Veterans Court expanded the scope of the presumption of competency, and two derivative arguments. None have merit.

A. The Veterans Court Did Not Transform The Presumption Of Competency

As we detail above, the Veterans Court neither transformed nor interpreted the presumption of competency in its decision, warranting dismissal of this appeal. Nonetheless, to the extent that the Court entertains this issue, the record shows that the Veterans Court committed no error related to the presumption.

In his opening brief, Mr. Francway argues that the Veterans Court expanded the scope of the presumption of competency, transforming the presumption of competency into a presumption of expertise. Applnt. Br. 31-33. He asserts that as previously applied, the presumption means that an individual who is chosen to perform an examination "is presumed to be a *competent medical examiner*" or a "*competent healthcare professional*." Applnt. Br. 31, 32. Mr. Francway argues that the Veterans Court expanded "the presumption to hold that, when the VA specifically orders that an examination be conducted by a 'specialist,' the individual chosen to perform the examination is *presumed to be a specialist*." Applnt. Br. 32. Mr. Francway is mistaken.

First, Mr. Francway misstates the Veterans Court's decision. As we detail above, Mr. Francway's claim below was not a challenge to the competency of a medical examiner, but 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. The Veterans Court referred to the presumption of competency in the context of determining that Mr. Francway had waived his argument regarding whether the internist was an "appropriate medical specialist" under the board's order. *Id*. The Veterans Court's decision contains no explicit or implicit interpretation of the presumption of competency, but rather simply quotes this Court's description of the presumption

when finding that Mr. Francway waived the issue. *See id.* Specifically, the Court explained that, because Mr. Francway did not raise the issue of substantial compliance with the remand order based on the examiner's qualifications to the board, the board was not required to provide a statement of reasons and bases on the issue. Appx9-10.

Accordingly, because the Veterans Court decision contains no interpretation of the presumption of competency, the court could not have expanded the presumption as Mr. Francway now alleges.[2]

Second, even if the Veterans Court interpreted the presumption, which it did not, Mr. Francway's challenge still fails because he misstates the breadth of the presumption of competency. Contrary to his assertion otherwise, the presumption is not limited to a presumption that an examiner is a "competent healthcare provider." Applnt. Br. 32. Rather, the presumption of competency presumes that VA selected a qualified healthcare provider for the particular medical opinion. As the Veterans Court correctly observed, the presumption of competency presumes

[2] In fact, the Veterans Court could have properly found that Mr. Francway waived his procedural argument regarding substantial compliance even without reference to case law regarding the presumption of competency. *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015) (explaining that it is appropriate for the board and the Veterans Court to address only those procedural arguments specifically raised by the veteran, while giving the veteran's pleadings a liberal construction, because the failure to raise a procedural issue may reflect a deliberate decision to forgo the issue to avoid remand to cure procedural error that may be irrelevant to final resolution and may delay resolution).

that VA "'has properly chosen a person who is qualified to provide a medical opinion in a particular case.'" Appx9 (quoting *Parks*, 716 F.3d at 585). In *Parks*, this Court explained that "competency requires some nexus between qualification and opinion." 716 F.3d at 585. The Court continued that "one part of the presumption is that the person selected by the VA is qualified by training, education, or experience in the particular field[.]" *Id*.

In fact, the manner in which the presumption can be overcome supports that the presumption of competency is not limited to whether the medical examiner is a competent healthcare provider. In *Parks*, this court explained that "the presumption can be overcome by showing the lack of th[e] presumed qualifications[,]" that is the examiner's "training, education, or experience in the particular field[.]" *Id*. Thus, to rebut the presumption of competency, a veteran need not demonstrate that the medical examiner was incompetent as a healthcare provider, but rather lacked the training, education, or experience for the particular medical opinion.

Accordingly, the presumption of competency is not limited to a presumption that the examiner is a "competent healthcare provider" as Mr. Francway asserts, but rather presumes that the VA has selected a qualified medical examiner for a particular opinion. This includes whether the medical examiner has the "training, education, or experience in the particular field" of specialty required for the

medical examination, *see Parks*, 716 F.3d at 585, and is thus an appropriate medical specialist for a remand.

Third, because there was no "transformation" of the presumption of competency, Mr. Francway's argument that the allegedly-transformed presumption violates the duty to assist fails. Applnt. Br. 33 (citing 38 U.S.C. § 5103A). Mr. Francway contends that section 5103A requires VA to ensure that when the board orders an opinion by a specialist, the selected examiner is a specialist and that "VA may not rely on a court-created 'presumption' to satisfy this affirmative duty." Applnt. Br. 34. This argument reflects Mr. Francway's continued misunderstanding of the Veterans Court's decision. As explained above, the Veterans Court referred to the presumption of competency in the context of explaining that 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. Appx9-10. The presumption was not, however, utilized to relieve the board of its responsibility to ensure substantial compliance.[3]

[3] The interplay between the presumption of competency and the duty to assist is discussed in further detail in section IV.C.2.

B. The Veterans Court Correctly Found Mr. Francway Waived His Challenge

Mr. Francway's derivative argument that the Veterans Court erred when finding he waived any challenge to whether the internist qualified as an appropriate medical specialist also lacks merit. As we detail above, Mr. Francway argues the Veterans Court's decision is "wrong," *see* Applnt. Br. 34, which is a question of fact over which this Court does not possess jurisdiction. Nevertheless, the Veterans Court correctly found that Mr. Francway had not raised the issue before the board.

On appeal, Mr. Francway contends that his argument before the board was "broad enough to encompass" a challenge to the internist's qualifications. Applnt. Br. 35 (citing Appx111-117). Yet, the record shows that Mr. Francway challenged only the adequacy of the internist's opinion, not her qualifications to provide an opinion. *See* Appx116. Specifically, Mr. Francway challenged the internist's conclusion regarding the possibility that Mr. Francway was injured after service and her treatment of the buddy statement in support of his claim. *Id*. A challenge to the adequacy of a medical opinion does not encompass a challenge to the examiner's qualifications. *See Mathis v. McDonald*, 834 F.3d 1347, 1351 (Fed. Cir. 2016) (Hughes, J., concurring) (explaining that "whether an examiner is competent and whether he has rendered an adequate exam are two separate inquiries"); *Bastien v. Shinseki*, 599 F.3d 1301, 1307 (Fed. Cir. 2010) (explaining

that a challenge to a medical expert's opinion on the ground that he was not an independent medical expert because he was employed by VA questioned not his medical competence or expertise, but his objectivity).

Mr. Francway continues that, pursuant to *Sullivan v. McDonald*, this Court may entertain an issue of law adopted by the Veterans Court even if the veteran did not raise it to that court. Applnt. Br. 35-36 (citing 815 F.3d 786, 789 (Fed. Cir. 2016)). Again, Mr. Francway misunderstands the Veterans Court decision. The Veterans Court did not decline to entertain an issue of law that Mr. Francway did not press, but upon which the board nevertheless relied. Rather, it held that, because Mr. Francway did not raise the issue of substantial compliance with the remand order based on the examiner's qualifications to the board, the board was not required to provide a statement of reasons and bases on the issue. Appx9-10.

C. The Veterans Court Correctly Found Mr. Francway Failed To Demonstrate Prejudicial Error

Mr. Francway's derivative argument that the Veterans Court erred when finding he failed in his burden of demonstrating prejudicial error also lacks merit. As we detail above, the Veterans Court determined that "even assuming [Mr. Francway] is not precluded from raising this issue for the first time on appeal," he failed to demonstrate prejudicial error because he failed to explain why an internal medicine specialist may not qualify as "an appropriate medical

specialist" and failed to explain how or why the opinion did not substantially comply with the board's request. Appx10.

On appeal, Mr. Francway contends that the Veterans Court inappropriately shifted the burden to require him to establish that the internist was not an appropriate medical specialist. Applnt. Br. 34. Mr. Francway, however, does not identify a shift in burdens, but rather the Veterans Court's application of the principle that an appellant bears the burden of persuasion on appeals to the Veterans Court to demonstrate prejudicial error. *See Sanders*, 556 U.S. at 409; Appx10-11 (citing *Sanders*, 556 U.S. at 409).

To the extent Mr. Francway suggests that prejudice should be presumed in matters involving the qualifications of medical examiners or substantial compliance with board remand orders, his suggestion would be inconsistent with 38 U.S.C. § 7261(b)(2), which requires the Veterans Court to "take due account of the rule of prejudicial error," as well as this Court's precedent. *See Gambill v. Shinseki*, 576 F.3d 1307, 1311 (Fed. Cir. 2009) (explaining that harmless error is applicable to veterans' claims cases, subject to the same principles that apply generally to harmless error analysis in other civil and administrative cases, including that the party seeking reversal carries the burden of showing that prejudice resulted).

Moreover, Mr. Francway ignores that the Veterans Court also found no error because Mr. Francway's arguments were "underdeveloped or lacking in support in legal authority and therefore do not satisfy his burden of persuasion on appeal to show [b]oard error." Appx10 (citing *Coker v. Nicholson*, 19 Vet. App. 439, 442 (2006) (per curiam), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x. 371 (Fed. Cir. 2008) (per curiam order); *Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006); U.S. Vet. App. R. 28(a)(5)).

The Veterans Court correctly observed that Mr. Francway failed to explain why an internal medicine specialist may not qualify as an "appropriate medical specialist." Appx10. Like his brief before this Court, *see* Applnt. Br. 32, Mr. Francway's brief before the Veterans Court, *see* Appx39-40; Appx83, reflects an assumption that the board's remand required a specialist in orthopedics. The board's remand, however, directed that the claims file be reviewed by an "appropriate medical specialist" for an opinion. Appx4. Given that an internist is a physician who provides comprehensive medical care, providing diagnosis and medical treatment to adults,[4] such a person would be qualified through education,

[4] An internist is "a physician who specializes in the diagnosis and medical, as opposed to surgical and obstetrical, treatment of diseases of adults." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 950 (32d ed. 2012).

training, or experience to offer opinions regarding numerous issues, such as a back disability.[5]

IV. This Court Correctly Denied Mr. Francway's Petition For Hearing *En Banc*

Mr. Francway's opening brief, filed prior to this Court's denial of his petition for hearing *en banc*, requests that this Court hear this appeal *en banc*. Applnt. Br. 17-31. Mr. Francway's argument in favor of *en banc* hearing in his opening brief is a near-reprint of the argument in his petition for hearing *en banc*. *Compare id*. *with* ECF No. 14. at 7-17.

Although the Court has already declined to hear this appeal *en banc*, we include the Secretary's response to Mr. Francway's argument in his petition for hearing *en banc* below, for the convenience of the Court.[6]

A. 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.

[5] Mr. Francway also ignores that the orthopedist issued a *post-remand* opinion, diagnosing Mr. Francway 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.

[6] Substantively, Mr. Francway's *en banc* hearing argument in his opening brief is nearly identical to his prior argument in his petition, but for several footnotes and additions to string cites. These additions do not alter his argument, and thus do not alter the Secretary's prior response.

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.[7]

Second, as in *Mathis*, Mr. Francway did not raise a challenge to the competency of the examiner before the board, and thus waived the issue. 834 F.3d at 1350 (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

[7] 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, including the post-remand opinion, which one would expect had he really intended to challenge the medical opinion evidence before the board and Veterans Court.

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.

B. 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*, 716 F.3d 581, *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*, 599 F.3d 1301; *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*.

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

1. 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,[8] 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,[9] 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

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

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

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

2. 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, citing *Wise*, 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 these reasons, we respectfully request that the Court dismiss this appeal, or alternatively, affirm the Veterans Court's decision.

Respectfully submitted,

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December 19, 2018

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32 (a)

This brief complies with the type-volume limitation of Federal Rule of Federal Circuit Rule 32(a). According to the word-count calculated by the word processing system with which this brief was prepared, the brief contains a total of 8,912, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

/s/William J. Grimaldi

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 19th day of December 2018, a copy of the foregoing "BRIEF FOR RESPONDENT-APPELLEE" was filed electronically.

X This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/William J. Grimaldi