18-2136

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, Case No. 16-3738

APPELLANT'S REPLY BRIEF

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January 16, 2019

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Francway **v.** Wilkie

Case No. 18-2136

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ■ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Ernest L. Francway, Jr.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Ernest L. Francway, Jr.	N/A	N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Sean A. Ravin, Esq.

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None.

8/20/2018
Date

/s/ William H. Milliken
Signature of counsel

Please Note: All questions must be answered

William H. Milliken
Printed name of counsel

cc: Counsel of Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

This appeal presents two discrete questions concerning the scope and viability of the "presumption of competency," the judge-made doctrine under which this Court and the CAVC presume that VA medical examiners are competent unless the veteran can prove otherwise.

The first question is whether the presumption should exist at all. For the reasons explained in Mr. Francway's opening brief and petition for hearing en banc, the presumption of competency should be discarded altogether because it is illegitimate, illogical, and inconsistent with the pro-claimant nature of the VA-benefits adjudication system.[2]

The second question is whether, even if the presumption is retained, it should be further extended to cover the situation here, in which a remand order *explicitly requires a specialist*. This reply addresses this second question first, as it can be resolved by the panel without the need for en banc hearing. The Board's 2013 Remand Order required that "an appropriate medical specialist" render an opinion concerning the etiology of Mr. Francway's back injury. The VA's own manual distinguishes specialists from ordinary medical examiners, defining a "specialist" as "a clinician who specializes in a particular field." VA Manual M21-

[2] Mr. Francway acknowledges that the presumption may be overruled only by the Court sitting en banc. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1352 (Fed. Cir. 2004). Mr. Francway again requests that the Court hear this case en banc so that the full Court may do so.

1 § III.iv.3.A.1.h. The doctor who ultimately provided the opinion, however, was an internist, and there is no evidence that the internist had any expertise in treating back injuries. But the CAVC nonetheless concluded that it could presume that the internist was "an appropriate medical specialist" because of the presumption of competency. In the process, the CAVC transformed the presumption of competency into a presumption that every VA medical examiner is a specialist in every area of medicine. That extension must be rejected because it is inconsistent with the VA's duties to assist and to ensure substantial compliance with remand orders.

The government cannot defend the CAVC's decision. So, instead, the government tries to rewrite it, arguing that the CAVC did not actually interpret the presumption of competency at all. The government also spends much of its time raising various procedural hurdles that it claims prevent this Court from reaching the merits. Each of these arguments is based on a misinterpretation of the CAVC's decision, a misunderstanding of the presumption of competency, or both. The CAVC's decision is squarely premised on a novel interpretation of the presumption of competency, and the validity of that interpretation is ripe for this Court's review.

The CAVC's decision should be vacated, and this case should be remanded for further proceedings under the correct legal standard.

ARGUMENT

I. THIS COURT SHOULD REJECT THE CAVC'S ADOPTION OF A PRESUMPTION OF EXPERTISE BECAUSE IT IS INCONSISTENT WITH THE APPLICABLE STATUTES AND REGULATIONS.

In adjudicating veterans-benefits claims, "the VA is required . . . to rely only on 'competent medical evidence.'" *Parks v. Shinseki*, 716 F.3d 581, 584 (Fed. Cir. 2013). "'Competent medical evidence' is 'evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." *Id.* (quoting 38 C.F.R. § 3.159(a)(1)). The VA is also required to ensure substantial compliance with remand orders. *Chest v. Peake*, 283 F. App'x 814, 816-17 (Fed. Cir. 2008). Taken together, these principles require that, when the Board determines that a medical opinion from a specialist is required to adjudicate a claim, the VA has an affirmative duty to ensure that a specialist is in fact procured.

The CAVC's holding that the VA may simply presume that *every* examiner is a specialist is inconsistent with that affirmative duty. It is also inconsistent with common sense. As the CAVC itself has recognized, "a medical professional is not competent to opine as to matters outside the scope of his or her expertise." *Leshore v. Brown*, 8 Vet. App. 406, 409 (1995). Yet the court here assumed that every medical professional is not only competent in, but also an *expert in*, every area of medicine. There is no basis in law or logic for such an assumption.

The government does not seriously dispute any of this. The government's defense of the CAVC's novel extension of the presumption (at 17-19) spans two pages and reduces to an argument that there was no extension because the presumption has always been applied this way. In other words, according to the government, the presumption of competency has been a presumption of expertise all along.

The government is wrong. As described in *Parks*, the presumption enables this Court to presume "that the person selected by the VA is qualified by training, education, or experience in the particular field." 716 F.3d at 585. As the very next sentence in *Parks* makes clear, the Court's reference to "the particular field" means *the field of expertise of the provider*, which is not necessarily the same thing as the field of expertise needed for the veteran at issue. Specifically, *Parks* clarifies that "the presumption is that a nurse practitioner selected by the VA is qualified to *perform as designated*." *Id.* (emphasis added); *contra* Gov't Br. 18 (incorrectly suggesting that "the particular field" means the particular field relating to the veteran's condition).[3] Thus, "the presumption as applied [in the Federal Circuit's cases] was a presumption that a doctor with expertise in a certain topic was

[3] The government, quoting *Parks*, states (at 18-19) that the presumption "includes whether the medical examiner has the 'training, education, or experience in the particular field' of specialty required for the medical examination." Tellingly, the phrase "of specialty required for the medical examination" is not included in the quote—because that is not what the Court said.

qualified to opine on that topic." *Mathis v. McDonald*, 643 F. App'x 968, 984 (Fed. Cir. 2016) (Reyna, J., concurring) (citing *Parks*, 716 F.3d at 585). The Board and the CAVC have gradually expanded the presumption "to mean that *any* healthcare professional is competent to opine on *any* disease or condition." *Id.* (emphases added). Here, the CAVC went even further, presuming that any healthcare professional is not only *competent* to opine on any disease or condition, but also is a *specialist in every area of medicine*. Appx9-10.[4] The government can cite no case prior to this one adopting such an expansive position. This unprecedented extension of the doctrine is inconsistent both with the VA's statutory duties and with common sense. This Court should reject it.

II. THE GOVERNMENT'S PROCEDURAL ARGUMENTS LACK MERIT.

Lacking any persuasive argument on the merits, the government presents three procedural hurdles that it claims prevent this Court from reaching the question presented: (i) the Court lacks jurisdiction over this appeal; (ii) Mr. Francway waived his challenge to Dr. Schechter's qualifications; and (iii) Mr.

[4] The government thrice notes (at 4, 24 n.5, 26 n.7) that Mr. Francway received a post-remand opinion from an orthopedist, and finds it "curious[]" that Mr. Francway's brief "does not focus upon the orthopedist's opinions." As Mr. Francway's opening brief explained (at 11-12), the orthopedist's opinion is irrelevant because, *by the VA's own admission*, it did not comply with the 2013 Remand Order. Appx439-440.

Francway failed to carry his burden to show prejudicial error before the CAVC. Each of these arguments misses the mark.

A. This Court has jurisdiction to review the CAVC's holding that VA medical examiners are presumed specialists in every area of medicine.

The CAVC's interpretation of the scope of the presumption of competency is a legal issue that this Court has jurisdiction to review. *See Morgan v. Principi*, 327 F.3d 1357, 1363 (Fed. Cir. 2003) (Federal Circuit may review CAVC decisions regarding the scope of judge-made rules of law).

1. The government does not dispute this legal principle, but instead argues (at 10-11, 17) that the CAVC merely "noted" the presumption of competency but did not "interpret[]" it. That blinks reality.

The presumption of competency has two components—one procedural and one substantive. Procedurally, the presumption places the burden of production on the veteran. If the veteran fails to challenge before the Board the qualifications of a VA-selected physician, including "set[ting] forth specific reasons why the veteran believes the expert is not qualified to give a competent opinion," the CAVC presumes that the examiner is competent. *Parks*, 716 F.3d at 585 (citing *Bastien v. Shinseki*, 599 F.3d 1301, 1307 (Fed. Cir. 2010)); *see also id.* ("A presumption exists, of course, to eliminate the burden to produce evidence."); *Mathis*, 643 F. App'x at 971-72. Substantively, the presumption also places on the veteran the

burden of persuasion to show that the examiner is incompetent. To "overcome" the presumption, the veteran must affirmatively show "the lack of th[e examiner's] presumed qualifications." *Parks*, 716 F.3d at 585-86.

The CAVC's decision here relied on both aspects of the presumption of competency to reject Mr. Francway's argument. *First*, the CAVC stated that Mr. Francway could not challenge the internist's qualifications on appeal because (i) he did not call Dr. Schechter's qualifications into question before the Board and (ii) the record did not "raise[] some irregularity in VA's selection process." Appx9-10 (citing *Parks*, 716 F.3d at 585; *Rizzo v. Shinseki*, 580 F.3d 1288, 1291-92 (Fed. Cir. 2009)). That is, Mr. Francway had not satisfied his burden of production. *Second*, the CAVC stated that Mr. Francway had "fail[ed] to explain why an internal medicine specialist may not qualify an 'an appropriate medical specialist.'" Appx10. That is, Mr. Francway had failed to "overcome [the presumption] by showing the lack of [the internist's] presumed qualifications," *Parks*, 716 F.3d at 585.

In short, the CAVC's rejection of Mr. Francway's argument that Dr. Schechter was not qualified as a specialist was premised *exclusively* on its extension of the presumption of competency to a circumstance in which it had never been applied: one where a remand order *explicitly calls for a specialist*. This Court has jurisdiction to review whether that extension was legally justified.

2. The government also erects (at 11-15) a jurisdictional straw man, contending that Mr. Francway's *real* argument is that the VA failed to comply with the 2013 Remand Order (a factual issue over which this Court would lack jurisdiction). That, too, is wrong. Mr. Francway can concede, for purposes of this appeal only, that, if the CAVC's interpretation of the presumption of competency were correct—i.e., if every VA medical examiner should be presumed a specialist in every area of medicine—the VA complied with the 2013 Remand Order. If, on the other hand, the CAVC's interpretation of the law was wrong—i.e., if the VA was required to affirmatively show that Dr. Schechter was "an appropriate medical specialist"—the CAVC's decision necessarily cannot stand, because no one disputes that the record lacks any evidence as to Dr. Schechter's qualifications. Thus, it is clear that the issue being raised here is purely legal. There is no dispute about the facts; the only dispute is about the legal rule that applies to those facts. *See Morgan*, 327 F.3d at 1363 (if "the decision below regarding a governing rule of law would have been altered by adopting the position being urged," this Court has jurisdiction).

The government appears to think that, because (i) Mr. Francway argued unsuccessfully to the Board and the CAVC that the VA had failed to ensure substantial compliance; (ii) substantial compliance is a question of fact; and (iii) this Court lacks jurisdiction to review factual issues, it necessarily follows that

(iv) this Court lacks jurisdiction over this appeal. That reasoning is logically flawed. In adjudicating the question of substantial compliance, the CAVC created a novel legal rule that every VA medical examiner is presumed a specialist. Based on that rule, the CAVC concluded that (i) Mr. Francway had not adequately challenged Dr. Schechter's qualifications as a specialist before the Board and (ii) Mr. Francway failed to show before the CAVC that Dr. Schechter was not a specialist. This Court has jurisdiction to review whether the legal rule applied by the CAVC is right or wrong. If it is right, the CAVC's decision should be affirmed. If it is wrong, the CAVC's decision must be vacated.

B. The CAVC's holding that Mr. Francway was precluded from challenging Dr. Schechter's qualifications on appeal because he had not done so before the Board was premised on its misunderstanding of the presumption of competency.

The CAVC's first holding—that Mr. Francway could not raise his argument to the CAVC because he had not adequately challenged Dr. Schechter's qualifications before the Board—was explicitly premised on its belief that, under the presumption of competency, Mr. Francway had the burden to articulate to the Board a specific reason that Dr. Schechter was not a specialist. Appx9-10; *see supra* Section II.A. Thus, the validity of this conclusion—which the government characterizes (at 20-21) as a finding of "waive[r]"—rises and falls with the merits issue of whether the court's interpretation of the presumption was correct. Mr. Francway's position is that—even assuming the presumption of competency as it

has previously been applied remains good law—if a remand order requires that the veteran be examined by a *specialist*, the VA's duties to assist and to ensure substantial compliance with remand orders require it to affirmatively establish that the examiner is in fact a specialist. *See supra* Section I. If that position is correct, then Mr. Francway was not required to challenge Dr. Schechter's qualifications before the Board. Instead, the burden was on the *VA* to demonstrate to the Board that Dr. Schechter was a specialist in diagnosing and treating back injuries. The government's "waiver" argument is thus simply a repackaged version of its disagreement with Mr. Francway on the merits of the legal question.

The government argues in a footnote (at 17 n.2) that "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." But the Board *did not do that*. It found that Mr. Francway was precluded from raising his challenge to Dr. Schechter's qualifications based on the rule of *Rizzo* and its progeny. And as the government elsewhere recognizes (at 12), this Court may "review only those decisions actually made by the lower court."[5]

[5] The government's argument is wrong even on its own terms. The case cited by the government, *Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015), confirms that veterans' procedural arguments must be "construed liberally," even in cases where the veteran is represented by counsel. *Id.* at 1380-81. Mr. Francway

In all events, the government does not dispute (at 21) that this Court reviews the CAVC's "legal interpretation[s]" regardless of whether the veteran ever raised the point to the Board or to the CAVC. *Sullivan v. McDonald*, 815 F.3d 786, 789 (Fed. Cir. 2016). Here, the CAVC adopted a novel interpretation of the presumption of competency to reject Mr. Francway's argument that the Board did not substantially comply with the 2013 Remand Order. *See supra* Sections I, II.A. Under *Sullivan*, the validity of that legal interpretation is properly before this Court irrespective of any waiver issues. 815 F.3d at 789.

The government attempts to sidestep this rule by repeating its erroneous refrain that the CAVC's decision did not actually have anything to do with the presumption of competency. Again, that is simply wrong. It is the government, not Mr. Francway, that "misunderstands the Veterans Court decision," Gov't Br. 21.

C. The CAVC's determination that Mr. Francway failed to demonstrate prejudicial error was likewise premised on its misunderstanding of the presumption of competency.

The CAVC, applying the substantive aspect of the presumption of competency, concluded that Mr. Francway had not shown prejudicial error because he had not adequately "explain[ed] why an internal medicine specialist may not qualify as 'an appropriate medical specialist.'" Appx10; *see supra* Section II.A.

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argued at length to the Board that Dr. Schechter's opinion did not comply with the 2013 Remand Order. Appx114-116. Construed liberally, that argument encompasses the more specific argument that Dr. Schechter was not "an appropriate medical specialist" as required by that order.

Thus, this determination, too, was part and parcel of the CAVC's conception of the presumption of competency as establishing that every VA medical examiner is presumed a specialist.

The government protests (at 22) that the CAVC was not "inappropriately shift[ing] the burden to require [Mr. Francway] to establish that the internist was not an appropriate medical specialist," but instead was simply applying "the principle that an appellant bears the burden of persuasion on appeals to the Veterans Court to demonstrate prejudicial error." In this case, however, that is a distinction without a difference. There is no evidence in the record (one way or the other) going to whether Dr. Schechter is an "appropriate medical specialist"—the record does not even contain Dr. Schechter's CV. The government does not dispute this point (and, notably, never asserts that an internist specializes in diagnosing and treating back injuries). The question, then, is to whose benefit that lack of evidence redounds. Under the CAVC's view of the law, the lack of evidence benefits the government, since the VA enjoys a presumption that any doctor chosen by the VA is a specialist in any required area. Under Mr. Francway's view of the law, the lack of evidence means that the VA has failed to satisfy its duty to ensure that Dr. Schechter is an appropriate specialist. Thus, if Mr. Francway's view of the law is correct, Mr. Francway necessarily satisfied his

burden of persuasion on appeal merely by pointing out that the government failed to present evidence of Dr. Schechter's expertise.[6]

The government also restates (at 23) the CAVC's conclusion that Mr. Francway's arguments "were underdeveloped or lacking in support in legal authority," as if this were an independent ground for denying Mr. Francway relief. But if the Board erred in interpreting the scope of the presumption of competency—which it did—then the Board's conclusion that Mr. Francway's arguments were "lacking in support in legal authority" must necessarily be vacated.

* * *

The presumption of competency is an anomalous, illegitimate, and unsound doctrine, and it should be discarded altogether, as explained in Mr. Francway's opening brief and more fully in the following section. But even if this Court retains the presumption, it should not permit the novel expansion of the rule effected by the CAVC here. There is no basis in law or logic for presuming that all VA-chosen medical examiners are specialists in all areas of medicine. The CAVC's decision should be vacated.

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[6] To draw an analogy: testimony of an expert witness is categorically inadmissible in federal court unless accompanied by at least *some* evidence of the witness's qualifications. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 n.10 (1993).

III. THE PRESUMPTION OF COMPETENCY SHOULD BE DISAVOWED.

A. The *Rizzo* presumption is illegitimate because it lacks any statutory or regulatory basis.

The first problem with the presumption of competency is that neither the CAVC nor this Court had the power to establish it.[7] The presumption "enjoys no apparent provenance in the relevant statutes," *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from denial of certiorari), and those statutes nowhere allow the CAVC or this Court to create judge-made presumptions for use in VA-benefits proceedings. Indeed, that the relevant statutes in fact establish several presumptions—all of which operate *in favor of the veteran*—"demolishe[s]" any argument that courts have freewheeling authority to establish other, extra-statutory presumptions that operate *in favor of the VA*. *See O'Melveney & Myers v. F.D.I.C.*, 512 U.S. 79, 86 (1994); Opening Br. 21-23.

The government concedes (at 28) that "the presumption is not explicitly stated in a statute." It then attempts to turn this argument around, reasoning that, if the presumption did not exist, there would be a "new, non-statutory requirement

[7] Curiously, the government leads its defense of the presumption of competency (at 28) by protesting that "the *Rizzo* Court did not create the presumption 'out of whole cloth'" in 2009, but instead followed the CAVC's 2007 decision in *Cox v. Nicholson*, 20 Vet. App. 563 (2007). It makes little difference whether it was the CAVC or this Court that invented the presumption; the fact remains that the presumption is illegitimate, illogical, and inconsistent with the governing statutory framework.

for VA to establish the competency of medical examiners." The government repeats (at 31) a version of this argument in attempting to distinguish *O'Melveny*, stating that Mr. Francway is in fact "the part[y] advocating the creation of new law." These arguments implicitly recognize a fundamental point that is ultimately fatal to the government's case: as with any issue in a legal proceeding, the burden to establish competency (or the absence of it) must fall on *someone*. Indeed, that is why presumptions and burdens exist. They exist to answer two questions: who loses if there is no evidence on an issue (answer: the party with the burden of production) and who loses if the evidence on an issue is in equipoise (answer: the party with the burden of persuasion).[8]

The veterans-benefits statute and the VA's implementing regulations answer both questions in favor of the veteran. The VA is statutorily required to assist a claimant in obtaining necessary evidence, including, in appropriate cases, a medical examination based on competent medical evidence. 38 U.S.C. § 5103A(a), (d)(1); 38 C.F.R. § 3.159. It follows that the burden is on the VA to produce evidence that the chosen examiner is in fact competent. *See Barr v. Nicholson*, 21 Vet. App. 303, 311-12 (2007) (VA must "ensure [a medical examination] was

[8] The government notes (at 29) that the "VA has not promulgated a regulation requiring an examiner's qualifications to be documented in the claims file." This merely begs the question of who benefits if the VA fails to document the qualifications.

adequate"). Moreover, under the benefit-of-the-doubt rule, the burden of persuasion is on the government too: if the evidence as to competency in equipoise, the veteran wins. *See* 38 U.S.C. § 5107(b). (The government elsewhere protests (at 33) that "[t]he-benefit-of-the-doubt rule is not implicated by the presumption of competency." But that argument is readily refuted by the text of the statute, which provides that "[w]hen there is an approximate balance of positive and negative evidence regarding *any issue material to the determination of a matter*, the Secretary shall give the benefit of the doubt to the claimant," 38 U.S.C. § 5107(b) (emphasis added). The issue of an examiner's competency is surely "material to the determination of a matter.")

The presumption of competency answers both of these questions too, but it answers them the other way. It puts the burden of production and persuasion on the *veteran* to show that the VA's chosen medical examiner is *not* competent. And that is why the presumption should be disavowed: as between the explicit commands of the applicable statutes and regulations, on the one hand, and the judge-made presumption of competency, on the other, the latter must give way.

In short, the government is correct that the burdens of production and persuasion with respect to the issue of examiner competency must fall on one party or the other. What the government fails to recognize is that statutes, regulations, caselaw, and common sense already tell us which party that is: the VA.

B. The presumption of regularity is not a proper foundation for the presumption of competency.

The government contends (at 31) that the presumption of competency is "rooted" in the presumption of regularity, which "provides that, in the absence of clear evidence to the contrary, [a] court will presume that public officers have properly discharged their official duties." *Rizzo*, 580 F.3d at 1292. But the presumption of regularity cannot properly form the basis for the *Rizzo* presumption, for three reasons.

1. *First*, application of the presumption of regularity depends on a critical factual predicate: that the process to which the presumption applies is routine and reliable. *See Mathis*, 643 F. App'x at 973. Neither this Court nor the CAVC possessed jurisdiction to make that predicate factual finding—and accordingly, neither court possessed jurisdiction to establish the presumption of competency. *See Kyhn v. Shinseki*, 716 F.3d 572, 577-78 (Fed. Cir. 2013) (holding that CAVC could not adopt presumption of regularity in the context of providing notice of VA examinations because CAVC lacked jurisdiction to find that the VA had a "regular practice" of doing so); Opening Br. 23-24.

The government does not even attempt to distinguish *Kyhn*. It instead cites (at 32) CAVC cases applying the presumption of regularity to the issue of whether the VA has mailed certain notices. But mailing a notice is a routine, non-discretionary, and ministerial act—hardly analogous to selecting a medical

examiner who is qualified to render a competent opinion in a given case. And especially in light of the significant evidence suggesting that the VA's procedures for selecting medical examiners are *not* routine and reliable, *see* Opening Br. 25-26, it stands to reason that proper application of the presumption in this context would indeed require a predicate finding of reliability.[9]

2. This leads to the second reason why the presumption of regularity cannot properly be applied in this context. The VA's processes for selecting medical examiners are not in fact routine and reliable. They are unpredictable, discretionary, and unreliable. *See* Opening Br. 25-27 (explaining the VA's near-total discretion and high error rate in selecting medical examiners).

Notably, the government's brief does not explicitly argue that the presumption is appropriate in this factual context. It simply notes (at 31-32) that the presumption has been applied in *other* contexts. But the cases cited by the government all involved ministerial matters, such as the mailing of official notices. *See Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004) (applying presumption to determine whether regional office timely mailed veteran a notice of its decision); *Butler v. Principi*, 244 F.3d 1337, 1338 (Fed. Cir. 2001) (applying

[9] The government states (at 32-33) that "the presumption of regularity can also be premised upon independent legal authority," apparently suggesting that the presumption may properly be applied to any action that a government actor is required to take. That cannot be correct—if it were, the presumption of regularity would swallow all of administrative law.

presumption to determine whether regional office mailed veteran a notice of his appeal rights); *Woods v. Gober*, 14 Vet. App. 214, 220 (2000) (applying presumption to determine whether regional office timely mailed veteran a notice of its decision).

As this Court recognized in *Mathis*, even if the presumption is properly applied to "ministerial, routine, and non-discretionary" matters like mailing notices, it does not follow that it should be applied to the very different question whether the VA has chosen an examiner who was competent to provide a medical opinion in a particular case. *See Mathis*, 643 F. App'x at 974-75. Indeed, prior to *Rizzo*, "it was unprecedented to apply the presumption or regularity" to such a process. *Id.* at 975 (Reyna, J., concurring). "Mailing a notice is very different from selecting an examiner: mailing is administrative but determining whether a specific nurse is qualified to provide an opinion on a particular issue is not." *Id.* at 982. The *Mathis* Court noted that it did not have sufficient information to "tell whether the procedures [for selecting VA medical examiners] are, in fact, regular, reliable, and consistent." *Id.* at 974. But what evidence is available suggests that the answer to that question is no. *See* Opening Br. 25-26; *see generally* Stacey-Rae Simcox, *The Need for Better Medical Evidence in VA Disability Compensation Cases and the Argument for More Medical-Legal Partnerships*, 68 S.C. L. Rev. 223, 230 (2016) ("[T]he reality is VA has consistently demonstrated difficulty fulfilling its

fundamental obligation to provide veterans with adequate medical examinations and opinions in the first instance.").

Indeed, one of the cases cited by the government, *Butler*, demonstrates the impropriety of applying the presumption of regularity to this issue. *Butler* distinguished between "evidentiary matters going to the merits of a benefit claim" and "the procedural responsibilities of the veteran," explaining that the presumption of regularity can apply to the latter but cannot apply to the former in light of the benefit-of-the-doubt rule. 244 F.3d at 1340-41. The question whether a VA medical examiner is competent to give an opinion in a particular case is an evidentiary matter going to the merits of the veteran's claim—not a procedural matter such as whether a veteran timely received a notice from the VA. It follows that application of the presumption of regularity to this question "conflict[s] with the pro-veteran nature of the veterans benefits adjudication system [and] the language of 38 U.S.C. § 5107(a) and (b) [i.e., the benefit-of-the-doubt rule]." *Id.*; *see also infra* Section III.C.

3. The final reason why application of the presumption of regularity is inappropriate in this context is that it gets things logically backwards. Presumptions exist "to eliminate the burden to produce evidence." *Parks*, 716 F.3d at 585. Thus, the "general rule" is that "where evidence required to prove a fact is peculiarly within the knowledge and competence of one of the parties," that party

"bear[s] the burden of coming forward." *Barrett v. Nicholson*, 466 F.3d 1038, 1042 (Fed. Cir. 2006) (citation omitted). The presumption of competency is inconsistent with this rule. Instead of placing the burden on the VA to show that its examiners are competent (a burden the VA could easily satisfy), the presumption places the burden on the veteran to show that a given examiner is incompetent. That makes no sense. "[P]roving a negative is a challenge in any context," *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J. concurring)—and especially in this one, given that many veterans are proceeding *pro se*, suffer from serious physical and mental handicaps, and have no way to obtain information about an examiner's qualifications. Opening Br. 27-28.

C. The presumption of competency is inconsistent with the pro-claimant nature of the VA adjudication system.

The applicable laws and regulations in the VA-benefits context favor the veteran at every turn and require the VA to use all the resources at its disposal to assist veterans in obtaining the benefits to which they are entitled. The presumption of competency stands as a glaring anomaly in this system. The government does not and cannot identify any other rule in the regime that operates to *disfavor* the veteran, as the presumption of competency does.

The *Rizzo* presumption is incompatible with the benefit-of-the-doubt rule, the pro-veteran canon of statutory construction, and the duty to assist. *See* Opening Br. 28-31. The government's attempts to show otherwise miss the mark.

1. The government's contention (at 33) that "[t]he benefit-of-the-doubt rule is not implicated by the presumption of competency" is, as noted *supra* Section III.A, refuted by the statutory text. The benefit-of-the-doubt rule applies to "any issue material to the determination of a matter." 38 U.S.C. § 5107(b). The competency of a VA medical examiner is decidedly "material to the determination of a matter."

2. The government also protests (at 33-34) that the pro-veteran canon has no role to play here because there is no "statute requiring VA to present affirmative evidence of an examiner's qualifications in every claim." But as explained *supra* Section III.A, the burden of production and persuasion with respect to competency must fall on one party or the other—and the relevant statutes and regulations demonstrate that they should fall on the government. The pro-veteran canon of construction merely reinforces this conclusion.

3. Finally, the government's attempts to show (at 34-37) that the presumption is consistent with the duty to assist in fact betray the extent to which the presumption impairs veterans in their efforts to obtain competent examiners.

The government first argues (at 34) that the presumption eases the administrative burden on the VA. It is not clear how that fact, even if true, would be relevant to the duty-to-assist question. But in any event, the VA's administrative concerns are overstated. "[S]imply attaching an examiner's CV to his report would

reveal the examiner's education, training, and experience. Attaching a CV to his report is a task an examiner can easily handle." *Mathis*, 643 F. App'x at 980 (Reyna, J., concurring). "A requirement that examiners attach their CVs to their reports would not create an undue administrative burden," particularly given that "examiners typically attached CVs to their reports before the presumption was created." *Id.* at 981; *see also id.* at 986 ("A veteran's need for a CV certainly outweighs the burden of routinely attaching it."). Moreover, the government has conceded that "there is nothing hard about" VA medical examiners "writing a couple sentences" describing their qualifications when they render an opinion. *Mathis v. McDonald*, No. 2015-7094, Oral Arg. 23:08-24:20 (Feb. 2, 2016).[10]

The government also states (at 34) that, under the current system, "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 also* Gov't Br. 35 (if a claimant requests additional information about the competency of an expert, VA must "consider" the request). These statements in fact demonstrate how detrimental to veterans' interests the presumption is. The presumption operates as much more than merely a waiver rule: if the veteran wants to raise the competency issue, he or

[10] Such a requirement would also comport with the rule that the party with superior access to information should bear the burden of production. *Barrett*, 466 F.3d at 1042.

she must offer specific reasons why the examiner's competency is suspect (a tall order without access to the relevant records). And even then, the VA need only "consider" (not necessarily grant) the request.

What is more, as Justice Gorsuch observed in his dissent from denial of certiorari in *Mathis*, the "VA usually refuses to supply information that might allow a veteran to challenge the presumption without an order from the Board." *Mathis*, 137 S. Ct. at 1995 (Gorsuch, J., dissenting from denial of certiorari). Justice Sotomayor made a similar observation. *See id.* at 1994 (Sotomayor, J., respecting denial of certiorari) ("[T]he VA does not provide veterans with that information as a matter of course.").

The government disputes (at 36-37) this proposition, but it fails to provide any evidence suggesting that the Justices were wrong. And the evidence that is available strongly suggests that they were right. Judge Reyna has shown that, "[e]ven if a veteran sufficiently challenges an examiner's qualifications, the Board has often failed to consider whether the examiner was qualified." *Mathis*, 643 F.3d at 978 & nn.8-9 (Reyna, J., concurring) (collecting cases). This is unsurprising, given that the VA Manual itself instructs ROs who receive questions about or requests for information regarding examiner competency to *themselves rely on the presumption of competency* in evaluating the request. VA Manual M21-1 § III.iv.3.D.2.o. The unfairness of this system is impossible to overstate: the VA

employs the presumption to deny veterans the information they need to rebut it. *See Mathis v. McDonald*, 834 F.3d 1347, 1360 (Fed. Cir. 2016) (Stoll, J., dissenting from denial of rehearing en banc) ("The agency itself should not rely on the presumption that it followed its rules when evaluating the very application of those rules.").

The government also protests (at 36) that the presumption does not always apply, citing a case holding that the presumption does not attach if the physician *explicitly disclaims* expertise in the relevant field. That is hardly reassuring. Medical professionals do not often "expressly impugn[] [their] own competence to answer the questions posed by the Board," as occurred in *Wise v. Shinseki*, 26 Vet. App. 517, 527 (2014). And the CAVC has held that a merely ambiguous (as opposed to explicit) disclaimer of competence does *not* prevent the presumption from attaching. *See Johnson v. McDonald*, 2015 WL 4075155, at *6-7 (Vet. App. July 6, 2015).

The government closes its brief (at 37) with the curious argument that jettisoning the presumption of competency "would jeopardize veterans' ability to secure benefits" because "[a]ny 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." But the Board does in fact require *private examiners* submitting opinions *on behalf of veterans* to

provide information regarding their qualifications, stating that it is "unable to assess their experience or qualifications to render an opinion when they do not include information regarding their specialty or a CV." *Mathis*, 643 F. App'x at 979 (Reyna, J., concurring) (collecting cases). Following the government's own logic, it stands to reason that the same requirement should apply to examiners selected by the VA. If "[t]he Board eschews wrongly awarding benefits by assigning undue weight to *favorable* medical opinions," then "[i]t should not assign undue weight to *unfavorable* opinions either." *Id.* at 980.

Moreover, as applied to VA-chosen examiners, the government's argument amounts to a suggestion that VA plans to challenge disability awards on the basis that the VA's own examiner was so incompetent that he or she improperly recommended awarding benefits to the veteran. That is the only circumstance in which the government's hypothetical could arise. The VA's apparent lack of confidence in the abilities of its own examiners proves Mr. Francway's point.

D. The government's arguments against en banc review are meritless.

Tellingly, the government opens its defense of the presumption of competency (at 24) not by justifying the doctrine on the merits, but by arguing that this case is a poor candidate for en banc review and reversal for procedural reasons. The government is wrong.

First, the government repackages its erroneous waiver argument as a "poor vehicle" argument, contending (at 25) that this case does not cleanly present the question of the viability of the presumption of competency because the CAVC's "holding was not premised on a presumption that the internist was competent." On the contrary, the CAVC's holding was premised *exclusively* on its belief that it could presume that the internist was "an appropriate medical specialist." Appx9-10. The government's contention otherwise is belied by the plain language of the CAVC's opinion.

Second, the government claims (at 26-27) that this case would be a better vehicle for deciding the continuing viability of the presumption if the VA had declined to provide a medical examiner's credentials in response to a request from Mr. Francway. This is hard to understand. The government's hypothetical fact pattern might present a better vehicle for deciding questions about the procedural niceties of the presumption if it is retained (for example, the precise nature of the showing that a veteran must make to force the VA to produce information about the examiner's qualifications). But with respect to the actual question presented here—whether the presumption should be discarded altogether—this case is an entirely appropriate vehicle. Application of the presumption was, after all, dispositive as far as the CAVC was concerned. Appx9-10.

Third, the government asserts (at 27) that, because this Court has adhered to the presumption since its establishment in *Rizzo*, its "precedents are uniform." Of course they are—it could not be otherwise, since panels of this Court are bound by prior panel decisions under the law-of-the-circuit doctrine. *See Mathis*, 643 F. App'x at 975; Bryan A. Garner, *The Law of Judicial Precedent* 492 (2016). If that were a reason for denying en banc review, this Court would hear cases en banc only in the exceptionally rare circumstances in which a panel disregards the law of the circuit.

Finally, the government states (at 37) that the "VA is in the process of considering additional procedures on this topic" and that en banc review should be denied "in order to permit the VA to fully consider the matter in accordance with its administrative authority." *Cox* was decided twelve years ago, *Rizzo* ten, and *Mathis* three. The VA has had ample time reconsider its procedures with respect to the competency of medical examiners, and yet it has not done so. Indeed, it appears that, to the extent practices have changed, they have changed for the worse: after *Rizzo* was decided, the VA largely discontinued a previous "practice of usually attaching an examiner's CV to his report." *Mathis*, 643 F. App'x at 981 (Reyna, J., concurring). The government's requests for further delay in discarding this unsound doctrine thus ring hollow. This Court's intervention is needed, and it is needed now.

CONCLUSION

The CAVC's decision should be vacated, and this case should be remanded for further proceedings.

January 16, 2019

Respectfully submitted,

/s/ *William H. Milliken*

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Form 30
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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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