United States Court of Appeals for the Federal Circuit

ROBERT M. SELLERS,
Claimant-Appellee,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent-Appellant.

2019-1769

Appeal from the U.S. Court of Appeals for Veterans Claims in Case No. 16-2993, Chief Judge Davis and Judges Schoelen and Allen

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. AND NATIONAL VETERANS LEGAL SERVICES PROGRAM IN SUPPORT OF CLAIMANT-APPELLEE AND IN FAVOR OF AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Robert M. Sellers v. Robert Wilkie

Case No. 19-1769

CERTIFICATE OF INTEREST

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

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
National Organization of Veterans' Advocates, Inc.	None	None
National Veterans Legal Services Program	None	None

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:

None

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

1/10/2020

Date

/s/ Benjamin C. Block

Signature of counsel

Please Note: All questions must be answered

Benjamin C. Block

Printed name of counsel

cc: Counsel of Record

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STATEMENT OF INTEREST OF *AMICI CURIAE*

National Organization of Veterans' Advocates, Inc. ("NOVA") is a not-for-profit educational membership organization comprising over 600 individual members actively engaged in representing this country's military veterans, their families, and their survivors before the Department of Veterans Affairs ("VA") and federal courts. NOVA's Bylaws include as its purpose the development of veterans' law and procedure through research, study, discussion, exchange of information, and participation as *amicus curiae* before this Court.

National Veterans Legal Services Program ("NVLSP") is one of the nation's leading organizations advocating for veterans' rights. Founded in 1981, NVLSP is an independent, nonprofit veterans service organization recognized by VA and dedicated to ensuring that the government honors its commitment to veterans. NVLSP prepares, presents, and prosecutes veterans' benefits claims before VA, pursues veterans' rights legislation, and advocates before this and other courts. NVLSP has secured more than $5.2 billion in VA benefits for veterans and their families.

The issues in this appeal lie at the core of NOVA's and NVLSP's experience and expertise. NOVA's members and NVLSP have extensive experience representing veterans before VA and are intimately familiar with the VA claims process and the challenges veterans often face raising all their claims with precision. NOVA and NVLSP also have a strong interest in the pro-claimant policy adopted by Congress and in defending decisions, such as the decision on appeal, that implement this policy.[1]

SUMMARY OF ARGUMENT

The Veterans Court's decision is consistent with the flexible, pro-claimant veterans' benefits process established by Congress, VA, and this Court's precedent. The claimant initiates this process by making a simple request for benefits, which need not request benefits with precision. Once the claimant makes this initial request, VA must determine the scope of the claim liberally and fully and sympathetically develop the claim to its optimum, including by determining all potential claims raised by the evidence, applying all relevant laws and regulations. For instance, if the

[1] All parties to this case have indicated that they do not object to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund preparing or submitting this brief.

claimant's application refers to his medical records, VA may not consider only benefits that are explicitly requested in the application, but must also consider whether the scope of the claim includes reasonably ascertainable diagnoses contained in the referenced records. The decision on appeal, which held that a claim for benefits may be raised by a general statement of intent to seek benefits combined with a reasonably identifiable in-service medical diagnosis reflected in the veteran's service treatment records, is a natural application of this flexible, pro-claimant process.

The Secretary's policy arguments against the Veterans Court's decision are misguided. *First*, the Secretary argues that the Veterans Court's decision asks VA adjudicators to consider improper issues, but in fact VA adjudicators already consider these issues and can continue to do so fairly according to VA rules and regulations. *Second*, there is no inequity in helping claimants who make a general request for benefits without prejudicing those who do not. *Third*, the Veterans Court's decision would not impose an undue burden on VA, especially since VA already must review a veteran's entire medical record with a sympathetic, pro-claimant perspective, and the decision only requires VA to

adjudicate diagnosed disabilities that, in the agency's judgment, would be reasonably identifiable from the record. *Finally*, the Veterans Court's decision is consistent with the rule that veterans are generally presumed to be seeking the maximum benefit allowed by law and regulation, and claimants will continue to have the opportunity to disclaim benefits for any disability.

ARGUMENT

I. VA and this Court Have Established a Flexible, Pro-Claimant Process in Which, After a Claimant Makes a Simple Request for Benefits, VA Must Determine the Scope of the Claim Liberally and Fully and Sympathetically Develop the Claim to its Optimum.

Congress has created a "strongly and uniquely pro-claimant" veterans benefits system. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). The claimant initiates the benefits process by making a simple request for benefits, such as by submitting a communication in writing that "indicat[es] an intent to apply" for disability benefits and "identif[ies] the benefit sought." 38 C.F.R. § 3.155(a) (effective to Mar. 23, 2015); *see Shea v. Wilkie*, 926 F.3d 1362, 1367 (Fed. Cir. 2019). Once a claimant has made that simple initial request, VA must determine the scope of the claim liberally and "fully and sympathetically develop the veteran's claim to its

optimum before deciding it on the merits," including by "determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations." *Hodge*, 155 F.3d at 1362–63 (quoting H.R. Rep. No. 100-963, at 13 (1988)) (internal quotation marks omitted); *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001). The decision on appeal is a natural application of this well-established framework established by this Court's precedent.

A. Congress and VA have created a pro-claimant system.

1. Congress has consistently expressed its intent to create a pro-claimant veterans' benefits system.

Congress has repeatedly expressed its intent that the veterans' benefits system be pro-claimant. For instance, in 1988, Congress passed the Veterans' Judicial Review Act and the Veterans' Benefits Improvement Act. Pub. L. No. 100–687, 102 Stat. 4105. This legislation created the Court of Veterans Appeals (later renamed the Court of Appeals for Veterans Claims), which for the first time allowed veterans to obtain judicial review of VA's benefits decisions. The accompanying report of the House Committee on Veterans' Affairs stated that "Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans

benefits," which "is particularly true of service-connected disability compensation where the element of cause and effect has been totally bypassed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty." H.R. Rep. No. 100-963, at 13, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795. The committee explained: "Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." *Id.* "Even then," the report continued, "VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof." *Id.*

In 1997, Congress provided an additional avenue for veterans to challenge benefits decisions by VA Regional Offices and the Board of Veterans' Appeals ("BVA") by making otherwise final VA decisions reviewable for clear and unmistakable error. Pub. L. No. 105–111, 111 Stat. 2271 (1997). The accompanying committee report explained that "[t]he VA claim system is unlike any other adjudicative process" because

"[i]t is specifically designed to be claimant friendly" and "non-adversarial," requiring VA to "provide a substantial amount of assistance to a veteran seeking benefits." H.R. Rep. No. 105-52, at 2. "Given the pro-claimant bias intended by Congress throughout the VA system, the Committee conclude[d] that this legislation [wa]s necessary and desirable to ensure a just result in cases where [clear and unmistakable] error has occurred," even though the challenged VA decision is otherwise final. *Id.* at 4.

Finally, the Veterans Claims Assistance Act of 2000 reinforced the pro-claimant nature of the VA benefits system by eliminating the rule that the Secretary could not assist claimants in obtaining evidence in support of their claims until the claimants had submitted a "well-grounded" claim, which included evidence of in-service injury or disease, a diagnosis of a current disability or disease, and a medical opinion that the current disability or disease is related to the in-service injury or disease. Pub. L. No. 106–475, 114 Stat. 2096. In the accompanying report, the committee reiterated that the VA benefits system "is specifically designed to be claimant friendly" and "non-adversarial." H.R. Rep. No. 106-781, at 5. The committee explained that the purpose of VA's duty to assist

"is and has been to assist veterans in developing claims and receiving benefits for which they are eligible." *Id.* at 9.

2. VA regulations have implemented Congress's pro-claimant policy.

VA has implemented Congress's pro-claimant policy throughout the veterans' benefits process. For instance, if VA receives a complete application, it must "notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim." 38 C.F.R. § 3.159(b)(1). If VA receives an incomplete application, it must "notify the claimant of the information necessary to complete the application." *Id.* § 3.159(b)(2).

VA also "has a duty to assist claimants in obtaining evidence to substantiate all substantially complete" claims. *Id.* § 3.159(c). This duty to assist includes an obligation to "provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim." *Id.* § 3.159(c)(4).

VA regulations mandate a pro-claimant approach to deciding claims. VA's express policy is "to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government." *Id.* § 3.103(a). VA must resolve any reasonable doubts in

favor of the claimant. *Id.* § 3.102. Finally, VA has "duty to maximize benefits," *Morgan v. Wilkie*, 31 Vet. App. 162, 168 (2019), by considering "all the schedular options available that could address the symptoms to which [the claimant] points." *Bane v. Wilkie*, No. 18-3434, 2019 WL 3418563, at *2 (Vet. App. July 30, 2019); *see also Buie v. Shinseki*, 24 Vet. App. 242, 250–51 (2010).

Until 2019, after a claim had been finally adjudicated, the claimant could reopen it "by submitting new and material evidence." 38 C.F.R. § 3.156. Until 2015, moreover, VA was required to accept certain reports of examination or hospitalization as an informal claim for increased benefits or to reopen a previously adjudicated formal claim. 38 C.F.R. § 3.157 (effective to Mar. 23, 2015).

In short, VA regulations implement Congress's pro-claimant policy by establishing a flexible, collaborative process in which VA and claimants work together to develop claims to their optimum, allowing VA to "grant[] every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a).

B. To initiate the benefits process, claimants need to file only a simple request for benefits and need not request benefits with precision.

A claimant must initiate the disability benefits process by requesting benefits, but in line with Congress's pro-claimant policy, this requirement is flexible and requires only a simple request.

1. This Court and the Veterans Court have established a flexible process for requesting benefits.

In *Shea v. Wilkie*, 926 F.3d 1362 (Fed. Cir. 2019), the veteran's application had not expressly listed psychiatric disabilities, but had referred to and asked VA to obtain medical records that identified those disabilities. *Id.* at 1364–65. This Court found that Shea's application satisfied the threshold requirements to request benefits: "The lesson of our cases is that, while a *pro se* claimant's 'claim must identify the benefit sought,' the identification need not be explicit in the claim-stating documents, but can also be found indirectly through examination of evidence to which those documents themselves point when sympathetically read." *Id.* at 1368. When "a claimant's filings refer to specific medical records, and those records contain a reasonably ascertainable diagnosis of a disability, the claimant has raised an informal claim for that disability under

§ 3.155(a)." *Id.* at 1370. This Court rejected "[t]he Veterans Court's apparent requirement" that a claimant expressly request benefits for a disability because such a requirement "is contrary to the more flexible standard we draw from our precedents." *Id.* at 1370. It thus rejected the core argument of law that the Secretary advances here.[2]

The Veterans Court has elaborated on the flexible, pro-claimant standard for requesting benefits. For example, "a claimant is not required in filing a claim for benefits to identify a precise medical diagnosis or the medical cause of his condition; rather, he sufficiently files a claim for benefits by referring to a body part or system that is disabled or by describing symptoms of the disability." *DeLisio v. Shinseki*, 25 Vet. App. 45, 53 (2011) (internal quotation marks omitted). Although a claimant may attempt to identify a particular diagnosis or theory of service connection, "his claim is not limited necessarily to benefits for that diagnosis" or "theory of service connection." *Id.*; *see also Clemons v. Shinseki*, 23 Vet. App.

[2] In addition to arguing for such a "magic words" requirement, the Secretary at multiple points asks this Court to determine facts or apply law to fact. *See, e.g.*, Sec'y Br. 17 ("[Mr. Sellers] did not indicate any intent to pursue benefits for a mental health condition until 2009 … ."). This Court lacks such power. *See* 38 U.S.C. § 7292(d)(2).

1, 5 (2009) ("[P]ro se claim submissions are not subject to a strict pleading standard.").

2. The history of the informal claim regulation illustrates the flexible process for requesting benefits.

The flexible, pro-claimant standard for claimants to request benefits is illustrated by the history of the informal claim regulation, which was most recently codified at 38 C.F.R. § 3.155.[3] When VA adopted its first regulations in 1938, it permitted veterans to request benefits not only by submitting the prescribed form, but also by submitting an informal claim. 38 C.F.R. § 2.1027 (1938); *see* James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 Veterans L. Rev. 1, 41 (2013). The regulation provided that "[a]ny communication from or action by a claimant or his duly authorized representative, which clearly indicates an intent to apply for benefits … may be considered an informal claim for compensation or pension." 38 C.F.R. § 2.1027 (1938). If the claimant submitted a formal application "within a reasonable time," the formal application would "be considered filed as of the date of receipt of the informal claim by the

[3] As discussed further below, 38 C.F.R. § 3.155 was amended in 2015 to replace the "informal claim" with an "intent to file a claim."

[VA].” *Id.* In close cases, “where the probability of an informal claim appears to be indicated, but the facts are too obscure or complicated for determination, the file will be referred to the director of the service concerned for decision upon the facts in the particular case.”[4] *Id.* In other words, when it was unclear whether a veteran’s filings raised an informal claim, the regulation did not require the claimant to provide more information, but instead afforded the claimant an additional round of VA review to determine if an informal claim could be identified.

In 1949, VA amended the informal claim regulation to require that “the communication must specifically refer to and identify the particular benefit sought.” 38 C.F.R. § 3.27 (1949). In 1961, however, when VA revised the informal claim regulation to substantially the same form in which it remained until 2015 (and which was in force when Mr. Sellers submitted his 1996 application for benefits), this requirement was relaxed. An informal claim no longer needed to “specifically refer to and identify the particular benefit sought,” but instead could simply “identify the benefit sought.” 26 Fed. Reg. 1561 (1961); 38 CFR § 3.155 (effective

[4] This provision for further review of inconclusive claims remained in force through the 1954 version of the informal claim regulation. 38 C.F.R. § 3.27 (1954).

to Mar. 24, 2015). VA also relaxed the intent requirement: An informal claim no longer needed to "clearly indicate[] an intent to apply" for benefits, but could simply "indicat[e] an intent to apply" for benefits. 26 Fed. Reg. 1561 (1961); 38 CFR § 3.155 (effective to Mar. 24, 2015). Courts have applied this flexible, pro-claimant standard to evaluate not only whether a claimant has requested benefits before filing a formal application, but also whether a claimant who has filed a formal application has requested benefits for a disability that is not expressly identified in the formal application. *See, e.g.*, *Roberson*, 251 F.3d at 1384; *Shea*, 926 F.3d at 1367.

In 2015, VA eliminated the informal claim framework but continued to provide claimants flexibility in claiming benefits.[5] Under the new framework, which remains in force, if a claimant "indicates a desire to

[5] This amendment does not apply to Sellers's application filed in 1996. Additionally, notwithstanding the Secretary's apparent argument to this Court that Mr. Sellers's application was incomplete because he wrote "Request [service connection] for disabilities occurring during active duty service" in block 40 of the application form, *see* Sec'y Br. 11–13, *amici* NOVA and NVLSP are unaware of VA actually having found the application to be incomplete during agency proceedings. A "central tenet of administrative law [is] that a reviewing court may not affirm an administrative agency's actions on a reasoned basis different from the rationale actually put forth by the agency. This rule is absolute." *Ray v. Wilkie*, 31 Vet. App. 58, 74 (2019) (emphasis in original; internal quotation marks omitted; citing, among other authorities, *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 198 (1947)).

file for benefits under the laws administered by VA, by a communication or action … that does not meet the standards of a complete claim," VA must send the claimant an application form and notify the claimant of "the information necessary to complete the application form." 38 C.F.R. § 3.155(a). A claimant may also file an "intent to file a claim" by using VA's electronic claims application system, submitting the prescribed "intent to file a claim" form, or oral communication to a designated VA employee who records the communication in writing. *Id.* § 3.155(b). An intent to file a claim need only "identify the general benefit (e.g., compensation, pension), but need not identify the specific benefit claimed or any medical condition(s) on which the claim is based." *Id.* Upon receiving an intent to file a claim, VA must send the claimant an application form and notify the claimant of "the information necessary to complete" it, and "[i]f VA receives a complete application form … within 1 year of receipt of the intent to file a claim, VA will consider the complete claim filed as of the date the intent to file a claim was received." *Id.*

In short, VA and the courts have implemented Congress's pro-claimant policy by establishing flexible procedures for claimants to request disability benefits. Claimants must make only a simple request for

benefits and need not request benefits with precision. As discussed further below, once a claimant has made this initial request for benefits, VA must work with the claimant to fully and sympathetically develop her claim to its optimum to ensure that the claimant receives all benefits to which she is entitled.

C. VA must determine the scope of a claim liberally and fully and sympathetically develop the claim to its optimum.

Consistent with Congress's pro-claimant policy, this Court has required VA to apply a flexible, pro-claimant standard to determine the scope of a claim for benefits. The Veterans Court has followed this Court's lead, elaborating on how this Court's pro-claimant standard applies to determining the scope of a claim in many different contexts.

1. This Court has required VA to apply a flexible, pro-claimant standard to determine the scope of a claim.

In a line of precedent beginning with *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998), this Court has repeatedly rejected a rigid, formalistic interpretation of veterans' filings in favor of a flexible, sympathetic interpretation that affords veterans all the benefits to which they are entitled.

In *Hodge*, this Court rejected the Veterans Court's strict test for determining when VA must reopen a claim based on "new and material" evidence because that test would "undermine the operation of the veterans' benefits system by altering its traditional character, making it more difficult for veteran claimants to submit additional evidence." *Id.* at 1364. This Court reasoned that "[t]his court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant," *id.* at 1362, and acknowledged Congress's intent that VA "'fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'" *Id.* at 1362–63 (quoting H.R. Rep. No. 100-963, at 13 (1988)).

In *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001), the Veterans Court had held that VA's decision not to award total disability based upon individual unemployability ("TDIU") did not contain clear and unmistakable error because the claimant had not expressly requested TDIU. *Id.* at 1382. This Court reversed, holding that "[o]nce a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability, the 'identify the benefit sought' requirement of 38

C.F.R. § 3.155(a) is met and the VA must consider TDIU." *Id.* at 1384. The Court explained that "[t]he VA must consider TDIU because, in order to develop a claim 'to its optimum' as mandated by *Hodge*, the VA must determine all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled as a claim for TDIU." *Id.*

Finally, in *Moody v. Principi*, 360 F.3d 1306 (Fed Cir. 2004), this Court rejected the Veterans Court's understanding that *Roberson* "identified a narrow factual scenario" that raises a claim for TDIU. *Id.* at 1310. That reading "disregard[ed] the broader holding of *Roberson*" that applies "with respect to all *pro se* pleadings" before VA—that VA must "give a sympathetic reading to the veteran's filings by 'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations.'" *Id.* (quoting *Szemraj v. Principi*, 357 F.3d 1730, 1373 (Fed. Cir. 2004)) (alteration in original) (internal quotation marks omitted); *see also Harris v. Shinseki*, 704 F.3d 946, 948–49 (Fed. Cir. 2013) (vacating and remanding because there was no "indication that the Veterans Court … acknowledged its obligation to require that the Board generously construe the evidence" and "resolve any ambiguities in [the

claimant's] favor."); *id.* at 948 n.3 ("the VA's duty to read filings liberally is equally applicable" to *pro se* clear and unmistakeable error claims and "direct appeals").

2. The Veterans Court has applied this Court's pro-claimant standard to determine the scope of a claim.

In many different contexts, the Veterans Court has applied this Court's pro-claimant requirements for determining the scope of a claim. For example, in *Wiggins v. McDonald*, No. 15-1692, 2016 WL 6091389 (Vet. App. Oct. 19, 2016) (mem. dec.), the veteran had initially requested service connection for physical disabilities from a car accident, but had not mentioned any psychiatric disabilities. *Id.* at *5. While his claim was pending, the veteran had been diagnosed with a psychiatric disability and had expressly requested service connection for that disability. The Board had found that his initial application had not raised a claim for a psychiatric disability because it had not expressly referred to that disability. *Id.* The Veterans Court vacated and remanded, holding that VA may not "myopically focus on what the veteran's formal application for benefits did and did not say," but rather must "consider whether the disabilities expressly identified by the veteran in [his initial application]

could have encompassed a mental disorder when viewed in light of the evidence he subsequently submitted and that the VA developed." *Id.* The agency should have recognized that the "evidence reasonably raises the possibility that Mr. Wiggins intended the [initial] filing to serve as a claim for all residuals of the in-service [car] accident." *Id.*; *see also Clemons*, 23 Vet. App. at 5 (PTSD claim "cannot be a claim limited only to that diagnosis, but must rather be considered a claim for any mental disability that may reasonably be encompassed by several factors including: the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim").

Similarly, in *Delisio v. Shinseki*, 25 Vet. App. 45 (2011), the Veterans Court held that if "a claimant files a claim for benefits of a condition," and the "cause of that condition ultimately is determined to be a disease or disability incurred in or aggravated by service," then the "claim for benefits for the condition 'reasonably encompasses' a claim for that causal disease or disability." *Id.* at 54. In *Delisio*, the veteran's originally claimed condition, peripheral neuropathy, was ultimately determined to

be caused by his service-connected diabetes, and thus his peripheral neuropathy claim "reasonably encompassed a claim for benefits for diabetes." *Id.* at 56.

A corollary of the pro-claimant standard for determining the scope of a claim for benefits is the pro-claimant standard for determining the scope of a claimant's appeal. In *Evans v. Shinseki*, 25 Vet. App. 7 (2011), the Veterans Court held that when it is ambiguous which substantive issues a claimant is raising on appeal, the "veteran-friendly process *requires* VA at the [Regional Office] or Board to seek clarification and communicate with the appellant as to any perceived concern" regarding the scope of the appeal. *Id.* at 15 (emphasis added). VA may not limit its review to "the four corners" of claimants' filings, but must "engage[] in a continuing dialog with claimants in a paternalistic, collaborative effort to provide every benefit to which the claimant is entitled," including working with claimants to perfect the issues they are raising on appeal. *Id.* at 16.

D. The decision on appeal is a natural application of this Court's precedent.

The Veterans Court held that "a general statement of intent to seek benefits, coupled with a reasonably identifiable in-service medical diagnosis reflected in service treatment records in VA's possession prior to the RO making a decision on the claim may be sufficient to constitute a claim for benefits." *Sellers v. Wilkie*, 30 Vet. App. 157, 161 (2018). This holding is a natural application of the flexible, pro-claimant framework established by this Court's precedent, in which a claimant must make only a simple request for benefits, and VA must determine the scope of the claim liberally and "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits," including by "determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations." *Hodge*, 155 F.3d at 1362–63; *Roberson*, 251 F.3d at 1384.

Although *Shea* addressed somewhat different facts, its analysis supports the decision on appeal. *Shea* held that, to request benefits, a claimant may "refer to specific medical records" that "contain a reasonably ascertainable diagnosis of a disability." 926 F.3d at 1370. Similarly

here, the Veterans Court held that a claimant may make "a general statement of intent to seek benefits," where the claimant's service treatment records reflect "a reasonably identifiable in-service medical diagnosis." *Sellers*, 30 Vet. App. at 161. When VA is determining the scope of the claim, *Shea* held that "VA must look beyond the four corners of [the claim-stating] documents when the documents themselves point elsewhere," for example, "to medical records." 926 F.3d at 1369 (citations omitted). Here, the Veterans Court held that when a claimant makes "a general statement of intent to seek benefits" and in-service "diagnoses are reasonably identifiable from a review of the record," VA "may not ignore" those disabilities. *Sellers*, 30 Vet. App. at 163.

II. The Secretary Has Not Shown that the Veterans Court's Decision Would Be Inequitable.

The Secretary makes four main arguments for why the Veterans Court's decision is purportedly bad policy. Each misses the mark.

First, the Secretary argues that the Veterans Court's decision would lead to arbitrary results because it would "ultimately base[] the scope of a claim on a particular VA adjudicator's view of the significance of a certain diagnosis or the level of detail provided by a particular doctor in service records," as well as the "sheer volume of medical records" in a

veteran's file. Sec'y Br. 33–34. However, VA rating decisions are already partly based on "a particular VA adjudicator's view of the significance" of a certain disabling condition. For instance, VA adjudicators "assign [veterans] a disability rating based on the severity of [their] disability,"[6] which at least partly depends on the adjudicator's view of the significance of the veteran's disabling condition and may also be influenced by the level of detail provided by the veteran's doctor. Moreover, VA adjudicators already must evaluate whether a claimant's medical records are sufficiently comprehensive to adjudicate his claim, and if more information is required, the adjudicators must notify the claimant and assist "in obtaining evidence to substantiate all substantially complete claims." 38 C.F.R. § 3.159(c). Thus, the issues that the Secretary argues are improper for VA to consider are already being considered by VA adjudicators, and these adjudicators should be able to evaluate these issues fairly by adhering to existing VA rules and regulations.

Second, the Secretary argues that the Veterans Court's decision would unfairly benefit claimants who make a general request for benefits

[6] Dep't of Veterans Affairs, *About VA Disability Ratings* (Oct. 4, 2019), https://www.va.gov/disability/about-disability-ratings/ (last visited Jan. 10, 2020).

over those who do not. Sec'y Br. 36. No veterans, however, would be *prejudiced* by the Veterans Court's decision. Instead, VA would simply *help* veterans who make a general request for benefits by generously construing their claims to include any reasonably identifiable diagnoses in their medical records.

The Court should reject the Secretary's suggestion that veterans who make a general request for benefits on "a form filled out to completion with other specifically identified disabilities" cannot intend to seek benefits that are not specifically identified. *Id.* Veterans often face many challenges that could make it difficult to identify all their claims with precision, and they might enumerate certain claims with precision but not others that they intend to raise. Furthermore, the Secretary's position is misguided because it would punish veterans for requesting certain benefits with specificity. The Secretary would have the Court presume that if a veteran specifically requests certain benefits, she does not desire any other benefits. Such a presumption has no place in Congress's proclaimant system, especially since VA must "engage[] in a continuing dialog with claimants in a paternalistic, collaborative effort to provide every benefit to which the claimant is entitled." *Evans*, 25 Vet. App. at 16.

Third, the Secretary argues that claimants are competent to refer to the body part or symptom for which they seek benefits and that requiring VA to identify additional disabilities would impose an undue burden on the agency. Sec'y Br. 34–35. But the VA benefits system is not designed to minimize the burden on VA, nor to maximize efficiency in adjudicating benefits claims. Instead, the system aims to provide claimants all the benefits to which they are entitled. Congress has already balanced veterans' interests against the government's interests and has resolved the balance decidedly in favor of veterans. *See* § I.A.

The Secretary's assertion of undue burden further rings hollow because VA already must review a veteran's entire medical record with a sympathetic, pro-claimant perspective in adjudicating the veteran's claims. *See, e.g.*, 38 U.S.C. § 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of *all evidence and material of record* and applicable provisions of law and regulation." (emphasis added)); 38 C.F.R. § 20.903(a); *id.* § 3.2600(a). The Veterans Court's requirement that VA adjudicate diagnoses that are reasonably identifiable in those medical records does not impose an undue burden on the agency.

Critically, the Veterans Court's decision does not require VA to adjudicate all disabilities evidenced in the record or even all disabilities diagnosed in the record. Instead, VA must adjudicate diagnoses that are *reasonably identifiable* from the record. The question whether a diagnosis is reasonably identifiable "is a factual determination" for VA, which must "determine, based on the totality of the service medical record, both qualitatively and quantitatively, whether the condition at issue would be sufficiently apparent to an adjudicator." *Sellers*, 30 Vet. App. at 163. The decision only requires VA to adjudicate diagnosed disabilities that, in the agency's judgment, would be reasonably identifiable from the record.

Finally, the Secretary argues that requiring VA to adjudicate all reasonably identifiable diagnoses deprives veterans of the ability not to seek benefits for certain disabilities. Sec'y Br. 37. But veterans are already generally "presumed to be seeking the maximum benefit allowed by law and regulation." *AB v. Brown*, 6 Vet. App. 35, 38 (1993). Additionally, in the "continuing dialog" between VA and claimants that is part of VA's "collaborative effort to provide every benefit to which the claimant is entitled," *Evans*, 25 Vet. App. at 16, the claimant always has the opportunity to disclaim benefits for any disability.

CONCLUSION

The Veterans Court's decision is a natural application of the flexible, pro-claimant standard for requesting benefits and determining the scope of claims established by this Court's precedent. *Amici* NOVA and NVLSP therefore respectfully request that the decision be affirmed.

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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