No. 2019-1769

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT M. SELLERS,
Claimant-Appellee,

v.

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

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

REPLY BRIEF OF RESPONDENT-APPELLANT

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

REPLY BRIEF FOR RESPONDENT-APPELLANT

INTRODUCTION

In the decision on appeal, the U.S. Court of Appeals for Veterans Claims (Veterans Court) held that, if a claimant's application identifies specific disability claims, but also includes a general remark that he is seeking benefits, VA is then compelled to search through his service records and to add other, unrelated diagnoses to the claim. As we demonstrated in our opening brief, the court cited no legal authority in support of this new duty for VA to unearth unstated claims on behalf of claimants.

In his response brief, Mr. Sellers refuses to support the Veterans Court's decision to base this new duty on the presence of a general remark on a claim initiation form. Instead, Mr. Sellers argues that "[t]here is no claim identification

requirement" for claimants at all, and that—upon receipt of any formal application—VA "always" must scour service records for unclaimed and unrelated diagnoses to add to the claim. Response Brief (Resp.) 10, 13. The Court has already rejected this argument. *See Veterans Justice Grp. v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1354-56 (Fed. Cir. 2016) (*VJG*). And, though Mr. Sellers attempts to stitch together various veterans law concepts (the duty to assist, the sympathetic reading doctrine) to support his argument, he fails to identify any legal authority that requires VA to add, *sua sponte*, unclaimed and unrelated medical conditions to a claim.

As we demonstrated in our opening brief, the relevant statutes, regulations, and VA instructions have consistently required claimants to provide *some indication* to VA of the symptoms or medical conditions being claimed. A single word (*e.g.*, "mental") is all that is needed. This requirement is entirely consonant with the sympathetic reading doctrine and the duty to assist, two doctrines that expand the scope of claims that are actually raised, and govern the division of responsibilities within the claim process. These doctrines do not, however, *create* claims for unidentified conditions.

In Mr. Sellers's case, he identified on his application the five specific physical disabilities for which he desired benefits. Mr. Sellers had no objection to VA's interpretation and adjudication of that application, and finality attached. This

Court should reject the proposition that VA was required to disregard his explicit identification of the disabilities he was claiming and to choose additional, unrelated diagnoses to add to the claim.

ARGUMENT

I. Mr. Sellers Agrees That There Is No Statute Or Regulation Requiring VA To Add Unrelated Diagnoses To A Claim

In our opening brief, we noted that the Veterans Court was unable to cite any statute or regulation supporting its new rule of law that VA is required to comb through service records for unclaimed and unrelated diagnoses to add to a claim. Opening Brief (Br.) 10-13. In his response brief, Mr. Sellers agrees that "there is no statute or regulation requiring VA to search service records for the purpose of adding to Mr. Sellers's claim unrelated diagnoses he did not explicitly identify on his formal application." Resp. 6. Instead, he argues, this requirement comes from "this Court's jurisprudence . . . as well as the jurisprudence of the Veterans Court." *Id*.

But any discussion of the law on claim presentation or condition identification must begin with statute and regulation. And here, Congress has (1) granted VA the authority to prescribe all appropriate rules regarding application forms, 38 U.S.C. § 501(a)(2), and (2) mandated that claims for benefits contain the information specified on VA's prescribed application form, 38 U.S.C. § 5101(a)(1)(A); *Fleshman v. West*, 138 F.3d 1429, 1431-32 (Fed. Cir. 1998)

(valid 38 U.S.C. § 5101(a) claim must "contain[ ] specified information . . . as called for by the blocks on the application form"); *see also Rodriguez v. West*, 189 F.3d 1351, 1353 (Fed. Cir. 1999); 38 U.S.C. § 3.151(a) (1996).[1]

That prescribed application form is VA Form 526 and—since at least 1944—this form has instructed claimants to identify the nature of the symptoms or medical conditions being claimed. *See* Appx142; Appx137. VA has a longstanding practice of interpreting this instruction liberally, but at least *some indication* from the claimant to VA of the condition being claimed has always been required. Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660, 57,671-72 (2014) (noting VA's "longstanding practice of accepting claimants' description of observable symptom(s) or experiences or reference to a part of the anatomy" as sufficient identification, but also that VA generally does not *sua sponte* add to a claim "entirely separate conditions never identified" by the claimant). And,

[1] Although amici cite statements in 1988, 1997, and 2000 legislative reports emphasizing the pro-claimant design of the veterans' benefits system, Amicus Brief (Am.) 5-8, none of those statements are inconsistent with (1) Congress's clear authorization for *VA* to set the rules for claim presentation, and (2) VA's instruction that a claimant provide at least *some indication* to VA of the conditions being claimed. Indeed, if post-1996 legislation or Congressional comments are relevant here, this Court would have to consider Congress's declaration that "a claimant has the responsibility to *present* and support a claim for benefits," 38 U.S.C. § 5107(a) (2000), a responsibility Congress did not consider to be new, S. Rpt. 106-397, at 20 (2000) (summarizing existing law and noting that "[c]laimants are expected to fill out appropriate claim forms and supply necessary information to expedite the processing of claims by VA").

according to this Court, the "requir[ement] that claimants identify symptoms or medical conditions at a high level of generality is a permissible construction of the statute." *VJG*, 818 F.3d at 1356.

In his response brief, Mr. Sellers claims that *VJG* "did not reach, and thus did not uphold, VA's position on claim identification." Resp. 12. To the contrary, VA's position here was the exact position challenged in *VJG.* In that case, the petitioners argued that "VA may not limit its review and adjudication to medical conditions and symptoms that are expressly identified in the veteran's filings and conditions secondary to those." 818 F.3d at 1355 (citation omitted).[2] Conversely, VA defended its authority to require that claimants describe to VA their "symptoms(s) or medical condition(s)" in order to complete their claim and receive adjudication for such symptoms or conditions. *Id.* (citation omitted). Further, while agreeing that it was "required to develop evidence *related* to the claim," VA argued that it had no duty to develop issues unrelated to the conditions "that *were* presented for adjudication." *Id.* (citation omitted).

[2] Amici here were two of the petitioners that proffered such argument in *VJG*, and they repeat this argument here, *see* Am. 3 ("VA may not consider only benefits that are explicitly requested in the application, but must also consider" unidentified diagnoses in service records), without explaining why this Court should now accept an argument it has already rejected.

This Court rejected the petitioners' challenge. *Id.* at 1356. It held that the statute does not require VA to develop issues unrelated to the conditions presented. *Id.* (the statute "does not directly address whether the VA must develop evidence outside the scope of a pending claim"). And it held that VA's position of "requiring that claimants identify symptoms or medical conditions at a high level of generality is a permissible construction of the statute." *Id.*[3]

In sum, proper consideration of the statutory and regulatory scheme, VA's instructions, and *VJG*'s holding on claim presentation and condition identification compel reversal of the Veterans Court's decision on appeal.

II. Mr. Sellers Agrees That The Veterans Court Committed Legal Error To The Extent Its Decision Relied On § 3.155(a) (1996) Or The Concept Of An "Informal Claim"

In our opening brief, we explained that 38 C.F.R. § 3.155(a) (1996) had no effect on the requirement that claimants identify to VA, at least at a high level of generality, the conditions they are claiming. Br. 18-23. We noted that an "informal claim" under § 3.155(a) served as a prompt for VA to forward the appropriate application form to the claimant—with the advantage of preserving an effective date—but that this provision had no operation when a formal application

[3] Though *VJG* was a case reviewing VA's 2014 regulatory changes, our argument here in no way relies upon the "regulatory elimination of informal claims" in 2014. *Contra* Resp. 6. *VJG* noted that the 2014 regulatory changes did "not alter the VA's general practice o[n] identifying and adjudicating issues." 818 F.3d at 1356.

was submitted. 38 C.F.R. § 3.155(a) (1996) (emphasis added) ("Upon receipt of an informal claim, *if a formal claim has not been filed*, an application form will be forwarded to the claimant for execution."); 38 C.F.R. § 3.151(a) (1996) (ultimately requiring the prescribed form—"the formal application"—for adjudication); *see also Mansfield v. Peake*, 525 F.3d 1312, 1318 (Fed. Cir. 2008); *Hartman v. Nicholson*, 483 F.3d 1311, 1315-16 (Fed. Cir. 2007); *Rodriguez*, 189 F.3d at 1353; *Fleshman*, 138 F.3d at 1432-33. We stated that, because Mr. Sellers filed a formal application, the VA Form 526, § 3.155(a) and the concept of an "informal claim" had no role in this case. Br. 20-23.

In his response brief, Mr. Sellers agrees that § 3.155(a) and the concept of an "informal claim" have no role here, for the reasons stated above. Resp. 3, 14-15, 23, 30. Thus, according to both parties, to the extent the Veterans Court relied on § 3.155(a) or the concept of an "informal claim" to find that unclaimed conditions could be lurking in a formal application for benefits, this was legal error. *See id.* at 3, 22, 42 (Mr. Sellers arguing that the court's reasoning was "flawed" and should be modified to clarify that § 3.155(a) does not apply here).[4]

[4] Despite the agreement of the parties here, amici misstates the law on this issue and continues to advocate for the idea of an "informal formal claim." To be clear, upon receipt of a "simple request for benefits," 38 C.F.R. § 3.155(a) (1996) did *not* require VA to develop and adjudicate that "informal claim," but required VA to *forward* a formal application to the claimant. *Contra* Am. 2, 4, 16. Further, amici's suggestion that § 3.155 "informal claim" principles can be used to interpret a formal application, Am. 14, strips the informal claim regulation from its context,

III. Mr. Sellers Does Not Defend The Veterans Court's Holding That A General Request For Benefits Triggers A VA Duty To Search For Unrelated Diagnoses To Add To A Claim, But Instead Argues For The Broader Rule That VA Must Always Search For Unrelated Diagnoses

The Veterans Court premised its decision on the fact that Mr. Sellers, in a block of the VA Form 526 calling for "[r]emarks," simply noted the purpose of his application: he was requesting service connection "for disabilities occurring during active duty service." Appx2 ("This statement plays a major role in this appeal."). The Veterans Court found that such a remark—a "general statement of intent to seek benefits"—legally obliged VA to search service records and add diagnoses noted therein to Mr. Sellers's claim. Appx1.

In our opening brief, we challenged the Veterans Court's decision to transform an extraneous remark—in an application that already identified five specific disabilities as the basis for the claim—into a statement sufficient to trigger a legal duty on the part of VA to search records for additional diagnoses unrelated to the disabilities already identified in the application. As we demonstrated in that brief, the Veterans Court identified no legal precedent for its decision to place this unbounded obligation on VA. Br. 16-18.

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which explicitly was limited to situations where "a formal claim has not been filed," § 3.155(a). The application of § 3.155(a) to formal applications would lead to an endless, absurd cycle of VA sending claimants formal applications in response to its receipt of their formal applications.

Mr. Sellers, too, does not attempt to defend the Veterans Court's decision to assign to an extraneous statement the power to bind VA to an open-ended search for additional, unidentified disabilities. He no doubt recognizes that the Veterans Court's reliance on the general statement in his formal application raises a significant problem of arbitrariness. Thus, instead, Mr. Sellers argues for the imposition of a much broader obligation upon VA: "There is *no* claim identification requirement when a claimant has filed a complete claim on a prescribed VA form." Resp. 13 (emphasis added). For Mr. Sellers, upon VA's receipt of an application, VA "always" must search the service records and add to the claim additional conditions it discovers. Resp. 10; *see id.* at 5-6 (arguing that VA is required to raise claims "regardless of whether the veteran has identified a specific or particular disability"), 26 (arguing that VA is "required to search records and raise claims for a claimant"). Mr. Sellers relies upon 38 C.F.R. § 3.103(a) (1996) to support his argument.

A. VA's Policy To Develop Issues "Pertinent To The Claim" Does Not Require It To Add Unrelated Diagnoses To A Claim

Section 3.103(a) states that "[p]roceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government." *Id.* The regulatory language includes specific limits on the assistance obligation that it

formalizes. First, VA must develop facts "pertinent to the claim," that is, VA must help the veteran to substantiate the claim that he or she has presented. Second, the benefit claimed must be "supported in law." This limit necessarily includes that the claim must adhere to the law of claim initiation. The regulation does not suggest or intimate in any way that, when a claimant requests compensation for one disability, VA is required to search the claimant's service records looking for other, unrelated diagnoses to adjudicate. *See* 79 Fed. Reg. at 57,672 ("[The provisions of § 3.103(a)] relate to matters that are reasonably within the scope of the claim filed by the claimant. They do not, however, create a duty to adjudicate matters unrelated to the claim filed."). Indeed, that interpretation would offend the explicit limiting language included in the regulation.

In his brief, Mr. Sellers asks, "[a]bsent the Secretary's review of the entire set of service records, how else would the Secretary be able to grant every benefit that can be supported in law?" Resp. 26. But the "grants every benefit" language of the regulation must be read in the context of the whole sentence. *Cf. Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (statutory language must be read in context since a phrase gathers meaning from the words around it). VA *does* review all service records,[5] and *does* grant every benefit that can be supported

[5] Because of this fact, amici argue that identifying additional diagnoses would not be burdensome. Am. 26. But there is a fundamental difference between reviewing records for evidence on a condition, and combing records for the purpose of raising

in law—within the context of the claim *presented*. If a claimant claims "depression," VA reviews service records for all potential psychiatric disabilities; if those records (or other evidence) reflect unemployment, VA considers a total disability rating based on individual unemployability (TDIU); if a legal provision can provide an easier evidentiary path to benefits or a higher disability rating, VA employs that provision; and if its decision implicates eligibility for special monthly compensation (SMC), dependents' educational assistance, or a housing or automobile allowance, VA awards those ancillary benefits. *See* 79 Fed. Reg. at 57,672. This is how VA grants "every benefit that can be supported in law"—by examining every available avenue for benefits *pertinent to the claim presented.* 38 C.F.R. § 3.103(a). But VA is not required to "develop evidence outside the scope of" the claim. *VJG*, 818 F.3d at 1356.

Importantly, the last phrase of § 3.103(a) requires VA to "protect[ ] the interests of the Government." Mr. Sellers's position on appeal is that VA adjudicators have been required, upon receipt of a benefits application, to embark on an unguided safari through service records to identify potential conditions to adjudicate—with absolutely no guidance from the claimant. If adopted, this

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unclaimed and unrelated diagnoses. And, of course, identification of the diagnoses would only be the first step; VA would then have to spend time and resources developing, providing medical examinations for, and adjudicating all these unclaimed diagnoses.

position would frustrate the "interests of the Government," grinding to a halt an already over-burdened claims system.[6] Rather, the approach that protects the interests of the Government, while also granting every applicable benefit for the claim presented, is the one consistent with statute, regulation, and VA instructions: a claimant must provide at least *some indication* to VA as to the conditions she intends to claim, so VA can ascertain the potential scope of the claim and develop that claim to its optimum. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must assume a coherent regulatory scheme and fit, if possible, all provisions into a harmonious whole); *Erickson v. United States Postal Serv.*, 759 F.3d 1341, 1349 (Fed. Cir. 2014) (eschewing statutory interpretation that would cause an exception to swallow the rule); *see also* Duty to Assist, 66 Fed. Reg. 45,620-01, 45,621 (2001) (rejecting comment that "it should be VA's burden to determine all the benefits to which a claimant is entitled").[7]

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[6] *This* is the "prejudice[ ]" to claimants amici fails to comprehend. Am. 25. Claimants who complied with the VA Form 526 and identified the conditions they intended to claim would have to wait as VA adjudicators forage through service records (both in the claimant's case and other cases) and adjudicate disabilities that were never claimed. The resultant delays would not in any way be "pro-claimant."

[7] Mr. Sellers also mentions that a previous version of VA's Adjudication Procedures Manual instructed VA adjudicators to develop issues and claims that are "reasonably raised." Resp. 39. But the examples provided by the Manual all involve evidence reasonably raising entitlement to increased benefits for an *already-service connected* disability, consistent with 38 C.F.R. § 3.157(b)(1) (1996). *See* VA Manual M21-1MR, pt. III, subpt. IV, ch. 6, § B.2 (2011).

B. The Statutory Duty To Assist Does Not Require VA To Add Unrelated Diagnoses To A Claim

Mr. Sellers erroneously invokes the statutory "duty to assist," as codified in 38 U.S.C. § 5103A, in his brief. Resp. 17-19. But that statute was enacted in 2000 and is not applicable to Mr. Sellers's 1996 application for benefits. *See* Pub. L. No. 106-475, § 3(a), 114 Stat. 2097 (2000). The statutory version of the duty to assist in effect at the time of Mr. Sellers's application mirrored the regulatory language of section 3.103(a) and required VA to "assist such a claimant in developing the facts *pertinent to the claim*." 38 U.S.C. § 5107(a) (1996) (emphasis added). As demonstrated above, this limiting language, which is consistent across the contemporary regulatory and statutory scheme, *see also* 38 C.F.R. § 3.159(a) (1996), circumscribed VA's duty to assist based on the scope of the stated claim, as initiated according to 38 U.S.C. § 5101(a).

Mr. Sellers criticizes the notion of a "conditional" duty to assist that would ask anything of a claimant. Resp. 19. But the duty to assist has never imposed claim identification responsibilities upon VA, and has always been dependent on what claimants present and identify to VA. *See Epps v. Gober*, 126 F.3d 1464, 1468 (Fed. Cir. 1997) (1996 version of the duty to assist applies "only" to claimants with "well grounded" claims); *Gobber v. Derwinski*, 2 Vet. App. 470, 472 (1992) (duty to assist "is not a license for a fishing expedition"); *see also* 38 U.S.C. § 5103A(a)(2) (2019) (VA may deny assistance in certain circumstances),

(a)(3) (VA may defer assistance until claimant provides essential information), (b)(1) (claimant required to "adequately identif[y]" private records), (c)(1) (VA assistance limited to records "relevant to the claim"). In 1996 and today, the statutory and regulatory scheme consistently invokes the claimant's identification of his or her claim as the touchstone for all subsequent claim development actions, beginning with the section 5101(a) requirement that the claim must contain the "specified information" prescribed by the Secretary, *Fleshman*, 138 F.3d at 1431-32, and through the claim-bounded duty to assist, 38 U.S.C. § 5103A(a) (duty to assist requires "reasonable efforts" to help substantiate "the claimant's claim").

C. The Sympathetic Reading Doctrine Does Not Require VA To Add Unrelated Diagnoses To A Claim

In our opening brief, we acknowledged VA's duties to read sympathetically all pro se filings and to develop the claim presented to its optimum. Br. 23-24.[8] We also demonstrated the fundamental difference between VA (1) broadly construing the scope of the claim presented, and (2) creating claims for unidentified conditions unrelated to the claim presented. Br. 29. While *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001), and its progeny are clear that all pro se filings must be sympathetically read, *VJG* was equally clear that no statute

[8] Though Mr. Sellers alleged that our opening brief "omitted . . . any reference to" eight decisions of this Court on sympathetic reading, Resp. 32, our opening brief in fact noted *all eight* of these decisions. Br. 24-25.

compels VA to develop or adjudicate issues unrelated to the claim presented, 818 F.3d at 1354-56.

In response, Mr. Sellers simply reiterates *Roberson*'s statement that "VA must determine all potential claims raised by the evidence, applying all relevant laws and regulations," 251 F.3d at 1384, as well as *Szemraj v. Principi*'s declaration that "*Roberson* is not limited to its particular facts," 357 F.3d 1370, 1373 (Fed. Cir. 2004). *See* Resp. 11. We recognize that *Roberson* is not limited to its particular facts, but this excerpt "must be understood in the broader context of that case." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2450 (2015). And the context in *Roberson* was this Court's explication of when VA must consider TDIU—a rating listed in the Code of Federal Regulations (C.F.R.) for disabilities causing unemployability. 251 F.3d at 1384. The Court stated that, when a claimant submits evidence of a disability and unemployability, "VA must consider TDIU because, in order to develop a claim 'to its optimum'. . . , 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.*[9]

In that context, *Roberson*'s statement is beyond dispute: since pro se claimants are not experts in the C.F.R., VA must consider a *relevant* regulation like TDIU when there is evidence of unemployability. But the logic of this statement unravels when extended to medical conditions *unrelated* to the disability identified by the claimant, as Mr. Sellers advocates here. First, such an extension conflicts with *Roberson*'s emphasis on relatedness. *See Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015) (*Roberson* requires consideration of "*related* claims for service-connected disability" (emphasis added)). Second, for medical conditions, the claimant, not VA, knows what symptoms are ongoing and prompted the application filing. *See Ingram v. Nicholson*, 21 Vet. App. 232, 256 (2007);[10] *cf*

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[9] As explained in our opening brief, the use of the word "claim" here could mislead. Br. 28. TDIU is a rating listed in the C.F.R. that could be relevant to a claim for compensation for a disability; it is not a "free-standing" basis for claiming benefits. *Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2008); *see* 79 Fed. Reg. at 57,672-74.

[10] We agree with Mr. Sellers that *Ingram* is instructive on the scope of the sympathetic reading doctrine. *See* Resp. 24. Because a claimant is not "expected to be able to articulate" his diagnosis with technical precision or expected to be aware of potentially applicable C.F.R. provisions (SMC, TDIU, etc.), VA—with its competence on these matters—must liberally read and fully develop the claim. *Ingram*, 21 Vet. App. at 255. But "it is the pro se claimant who knows what symptoms he is experiencing that are causing him disability," and VA has "no obligation to read the mind[ ] of the claimant" as to what disabilities he intends to

Shinseki v. Sanders, 556 U.S. 396, 409-10 (2009) (noting that the veteran, not VA, is in the best position to identify harm due to a notice error). And third, if *Roberson* applied to unrelated medical conditions, *VJG* could not have upheld VA's position to the contrary. *See* 818 F.3d at 1354-56.

As this Court explained in its non-precedential *Lacoste* decision, *Roberson* and its progeny require a sympathetic reading of all pro se filings, but "those cases are not inconsistent with" the requirement that a claimant desiring "compensation for a problem" must file an application that, "sympathetically read, directly or indirectly indicates an intent to seek benefits based on that problem." *Lacoste v. Wilkie*, 775 F. App'x 1007, 1012 (Fed. Cir. 2019); *contra* Resp. 9 (Mr. Sellers contending that such a requirement "eviscerates the notion" of sympathetic reading). The Veterans Court has practiced this balanced approach for decades. *See Brannon v. West*, 12 Vet. App. 32, 35 (1998) (VA must "interpret the appellant's submissions broadly," but is "not required to conjure up issues that were not raised by the appellant"); *see also Brokowski v. Shinseki*, 23 Vet. App. 79, 85-86 (2009) (claimant need not identify a disability "with technical precision," but "must describe the nature of the disability for which he is seeking benefits");[11]

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claim. *Id.* at 256 (internal quotation marks omitted).

[11] Mr. Sellers's assertion that the *Sellers* panel based its decision "almost entirely upon the holding in *Brokowski*" is incorrect. Resp. 20. *Brokowski* held that "a claimant must describe the nature of the disability for which he is seeking benefits"

Clemons v. Shinseki, 23 Vet. App. 1, 5-7 (2009) (claim for post-traumatic stress disorder (PTSD) will be sympathetically read to encompass other mental diagnoses, but not separate medical conditions).[12]

Such an approach recognizes the unique competence of the claimant when it comes to his own present ailments, *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 & n.4 (Fed. Cir. 2007); *Ingram*, 21 Vet. App. at 256-57, ensures a meeting of the minds between the claimant and VA, VAOPGCPREC 12-1992, 1992 WL 12600459, at ¶ 14, and avoids the inefficiency and uncertainty associated with VA construing and developing a claim based on guess work, *Brokowski*, 23 Vet. App.

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at least at a high level of generality. 23 Vet. App. at 86. The *Sellers* panel ignored this holding and invented a new "general statement of intent to seek benefits" standard. Appx1. The decision on appeal may have cited *Brokowski* at its outset, Appx3-4, but it certainly did not internalize *Brokowski*'s holding.

[12] Amici also cite *AB v. Brown,* 6 Vet. App. 35, 38 (1993), which held that claimants must be presumed to be seeking the maximum compensation level for the disability claimed; *Bane v. Wilkie*, No. 18-3434, 2019 WL 3418563, at *2 (Vet. App. July 30, 2019) (nonprecedential), which stated that VA must address all regulations "that could address the symptoms to which appellant points"; *DeLisio v. Shinseki*, 25 Vet. App. 45, 53-54 (2011), which held that a claim encompasses causal diagnoses for the claimed condition; and *Evans v. Shinseki*, 25 Vet. App. 7, 13-16 (2011), which held that VA must seek clarification of ambiguous substantive appeals and generally should engage in a "collaborative," continuing dialogue with claimants about the scope of their claims and appeals. *See* Am. 9, 11, 20-21, 27. We generally agree with these concepts—and question how it is "collaborative" or otherwise consistent with the above decisions to require VA, upon receipt of an application that is *not* ambiguous about the conditions being claimed, to scour records and unilaterally create claims for conditions unrelated to the application.

at 88-89 (claim for "all disabilities of record" that would require VA "to conduct an unguided safari through the record to identify all conditions for which the veteran may possibly be able to assert entitlement" is untenable); *Talbert v. Brown*, 7 Vet. App. 352, 356 (1995) (VA is not required "to conduct an exercise in prognostication": there must be "some indication" that an appellant "wishes to raise a particular issue"). Indeed, adopting Mr. Sellers's position here would lead to countless scenarios where VA spends time and resources on the development and adjudication of a diagnosis noted in service records that resolved long ago.

IV. Shea Explicitly Declined To Decide The Issue Here—And Is Distinguishable On Crucial Facts

In our opening brief, we explained that, in *Shea v. Wilkie*, 926 F.3d 1362 (Fed. Cir. 2019), the Court explicitly stated that it was *not* deciding the *Sellers* question: "whether the § 3.155(a) standard can be met by the existence of a diagnosis in claimant's medical records, without more, or in conjunction with a generalized request for all benefits that are supported in all medical records that VA would gather in the ordinary course." 926 F.3d at 1370; *see* Br. 29-30.[13] This reservation reflects the fact that *Shea* and *Sellers* differ in critical ways.

The first difference is finality. In *Shea*, Ms. Shea claimed four disabilities on her formal application (all the result of one in-service event), and once she

[13] Mr. Sellers asserts that "[n]owhere in *Shea* did this Court" make such an explicit

received VA's decision on that application, she immediately filed a timely notice of disagreement (NOD) raising her memory loss and psychiatric symptoms (also the result of that one in-service event) as well as a formal application requesting service connection for PTSD. 926 F.3d at 1365. In other words, she raised PTSD to VA *while her claim was pending on direct appeal*, just like any other claimant who—upon receipt of a decision on his application—believes that VA misinterpreted the scope of his application or wants to clarify his application.[14] In that context, the Court associated her PTSD claim with her pending claim. *Id.* at 1369. This ruling creates no issues with the doctrine of finality.

This case is different. VA's July 1996 decision on Mr. Sellers's March 1996 claim for benefits had been final for some time when he first raised the issue of PTSD to VA in 2009. Appx2; Appx132-40. The Veterans Court's decision here to revisit the claim interpretation and development that occurred in advance of VA's final July 1996 decision—and the court's holding that the VA must go back and re-develop the March 1996 claim for additional disabilities—flatly violates the doctrine of finality. *See Cook v. Principi*, 318 F.3d 1334, 1336-37 (Fed. Cir. 2002)

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statement, and then quotes this exact statement. Resp. 31-32.

[14] Cited by amici at 19-20, *Wiggins v. McDonald*, No. 15-1692, 2016 WL 6091389 (Vet. App. Oct. 19, 2016) (nonprecedential), accords with the circumstances in *Shea*, where the claimant clarified his application while it was pending to include a new diagnosis stemming from the same in-service event.

(en banc). While there are two exceptions to finality (new and material evidence, and clear and unmistakable error (CUE)), *id.* at 1337, neither applies here. Specifically, because CUE cannot be premised on a failure to develop or assist a claim, *id.* at 1346-47, VA's "failure" to search through service records and add unrelated diagnoses to Mr. Sellers's claim cannot constitute CUE. And, according to the *en banc* Court, "*Roberson* does not support" a contention otherwise. *Id.*

The Veterans Court's decision here eschews finality and imposes new duties upon VA for an application that has already been finally adjudicated. Appx5-6. That is inconsistent with law. While *Shea* involved the customary scenario of a claimant clarifying her application within the context of a live claim, Mr. Sellers's position on appeal would create a massive exception to finality in veterans law—as *any* finally-decided application in the history of VA jurisprudence would now be open for re-examination on the basis of VA not adding unrelated diagnoses to the claim.

The second difference involves the role of § 3.155(a). Consistent with the parties' briefing, the *Shea* panel assumed—without deciding the correctness of that assumption—that § 3.155(a) (2007) applied to Ms. Shea's filings (which included a formal application and several informal follow-up submissions), and explicitly premised its holding on § 3.155(a). 926 F.3d at 1368-70. The panel did not consider or address 38 U.S.C. §§ 501(a)(2), 5101(a), 38 C.F.R. § 3.151(a), the

specific purpose of § 3.155(a), the instructions of the VA Form 526, *Fleshman*, or *VJG* in its decision.

Here, however, the parties both argue that § 3.155(a) does not apply. Resp. 3, 14-15, 23, 30; Br. 19-23. Instead, the Government argues that this case implicates 38 U.S.C. §§ 501(a)(2), 5101(a), 38 C.F.R. § 3.151(a), the instructions of the VA Form 526, *Fleshman*, and *VJG*. Because the *Shea* panel based its holding on the applicability of § 3.155(a), that decision is distinguishable.

The third difference involves the specificity of medical records. The *Shea* panel highlighted that Ms. Shea's argument "relie[d] on the claim-stating documents' *concrete references to specified records*," and it held "only that, where 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)." 926 F.3d at 1370 (emphasis added). Through this holding, the Court distinguished between a claimant (1) identifying specific records that describe the disability she is claiming and (2) generally requesting that VA search service records and choose the disabilities for the claim. Thus, while Mr. Sellers believes that the *Shea* panel's awareness of *Sellers* "does nothing" for an interpretation of *Shea*, Resp. 32, the narrow nature of *Shea*'s holding very much reflects that the *Shea* panel did not want its decision to

be seen as prejudicing the outcome of the distinct and broader issue presented in *Sellers.*

In that regard, as noted in our opening brief, the facts of Mr. Sellers's case simply do not fall within *Shea*'s holding. Br. 31. His March 1996 application listed treatment records dating from 1981 through 1996—his entire second period of active duty service—which in no way can be considered a "concrete reference[ ] to specified records." 926 F.3d at 1370; *see* Appx137-38. In contrast, the "concrete references" in *Shea* were Ms. Shea's list of "treatment by specific physicians at specific facilities during specific periods" all associated with one in-service event. 926 F.3d at 1369. Therefore, though Mr. Sellers argues that *Shea*'s "specific medical records" holding "defeats the Secretary's appeal as a matter of law," Resp. 33-34, it is quite the opposite. The *Shea* panel's decision to limit its holding to "specific medical records" places Mr. Sellers outside the reach of *Shea* as a factual matter, and seriously undermines Mr. Sellers's position—that VA must "always" add to a claim unclaimed diagnoses noted in service records—as a legal matter. If the law required VA to search service records and choose additional diagnoses for every claim, the *Shea* panel would not have gone to such lengths to narrow its holding to scenarios where a claimant identifies "specific medical records." 926 F.3d at 1370.

V. <u>The Veterans Court's New Rule Is Arbitrary And Unworkable</u>

In our opening brief, we argued that the Veterans Court's guidance to VA for finding and choosing additional disabilities for a claim demonstrated the arbitrary and unworkable nature of its new rule. Br. 33-35. First, the court instructed VA to consider whether service records note "trivial conditions" or "significant illnesses," and whether the records "describe certain conditions in great detail or, in contrast, in only a passing manner." Appx5. Second, the court instructed the board to consider the "sheer volume of medical records" to determine whether a diagnosis is "reasonably identifiable." *Id.* Thus, what determines whether a disability is part of a claim under *Sellers* is not the claimant's intention, but a particular VA adjudicator's view of the significance of a certain diagnosis,[15] a particular doctor's predilection for or against detail, and the number of pages in the entire record.

In his brief, Mr. Sellers does not dispute that these arbitrary factors would govern under the Veterans Court's decision or his position on appeal. Instead, he argues that this is the way it always was supposed to be. Resp. 6 ("The decision on

[15] Amici attempt to defend this factor by asserting that VA rating decisions are "already partly based on 'a particular VA adjudicator's view of the significance' of a certain" disability. Am. 24. That is not the case. VA adjudicators have been prohibited from relying on their own medical assessments for the last 30 years. *See Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991).

appeal does nothing more than require the Secretary to do the job that Congress has always instructed him to do."), 40 ("[The court's holding] is not the creation of a 'new duty to search a veteran's records'. . . . This duty has always existed by regulation at § 3.103(a).").

Mr. Sellers appears to argue that, since the enactment of § 3.103(a) in 1972, VA has violated the law each time it failed to add to claims unclaimed and unrelated diagnoses noted in service records—and that every diagnosis therein that VA has not *sua sponte* raised and adjudicated remains pending. Adopting this position would resurrect millions of long-final applications. This is not a "misread[ing]" of the burden at stake here, but the natural consequence of Mr. Sellers's position that "[t]here is no claim identification requirement." Resp. 6, 13.

VI. <u>For Condition Identification, A Simple Rule Is Best</u>

On his March 1996 application, Mr. Sellers identified the five specific physical disabilities that he intended to claim (in two separate sections of the application, nonetheless). Appx137. If he also wanted to claim any sort of mental condition, he should have informed VA, "as called for by the blocks on the application form." *Fleshman*, 138 F.3d at 1431-32; Appx137 (block 17 requiring applicant to list the "nature of sickness, disease or injuries for which this claim is made"). He could have done so with language as simple as "mental" or "nervous"

or "stress," and his application shows that he was capable of putting to paper such language.

But Mr. Sellers chose not to. And, upon receiving a decision on his application that did not adjudicate a mental condition,[16] he chose not to file an NOD disputing how VA interpreted his application (presumably because VA adjudicated the exact conditions he had claimed). Instead, he first raised the issue of a mental condition to VA 13 years later. *See VJG*, 818 F.3d at 1356 (noting in support of its decision upholding VA's position that a claimant may always "file a new claim directed to the unrelated evidence").

In these circumstances, a simple rule is the best one: Mr. Sellers did not identify to VA any sort of mental condition in his March 1996 pleadings; therefore, his 1996 claim did not include a mental condition. VA was required to develop issues related to the claim that Mr. Sellers presented, but was not required to add to the claim unrelated diagnoses in service records. Neither the Veterans Court nor Mr. Sellers has cited a law that mandates otherwise.

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[16] VA did not find the application "incomplete"; VA *awarded* benefits for the disabilities actually claimed. Appx133; *contra* Am. 14 n.5.

CONCLUSION

For these reasons and the reasons stated in our opening brief, we respectfully request that the Court reverse the Veterans Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Circuit Rule 32(a). The brief contains 6,562 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 24th day of January, 2020, a copy of the foregoing REPLY BRIEF OF RESPONDENT-APPELLANT was filed electronically.

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