No. 2020-1072

IN THE

United States Court of Appeals for the Federal Circuit

ROBERT M. EUZEBIO,
Claimant-Appellant,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims Case No. 17-2879, Judges Michael P. Allen, Joseph L. Falvey, Jr., and Amanda L. Meredith

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BRIEF OF AMICUS CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM IN SUPPORT OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Euzebio v. Wilkie

Case No. 2020-1072

CERTIFICATE OF INTEREST

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certifies the following (use "None" if applicable):

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 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).

None.

Dated: February 28, 2020

/s/ Doris Johnson Hines
Signature of counsel

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INTEREST OF AMICUS CURIAE

The National Veterans Legal Services Program (NVLSP) is an independent, nonprofit organization that has worked since 1981 to ensure that the nation's 22 million veterans and active duty personnel receive the benefits to which they are entitled because of disabilities resulting from their military service to our country.[1] NVLSP provided critical leadership in supporting the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (VJRA), which created the U.S. Court of Appeals for Veterans Claims (CAVC) and bestowed upon it the authority to review final Board of Veterans' Appeals (Board or BVA) decisions denying claims of benefits. NVLSP has directly represented thousands of veterans in individual appeals to CAVC. NVLSP also publishes the *Veterans Benefits Manual*, an exhaustive guide for advocates who help veterans and their families obtain benefits from the Department of Veterans Affairs. It is from this experience and with this expertise that NVLSP addresses as *amicus curiae* when, pursuant to 38 U.S.C. § 7252(b), a document is constructively "on the record of proceedings before the Secretary [of Veterans Affairs] and the Board."

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* certifies that no part of this brief was authored by counsel for any party to this case and no party in this case, counsel for a party in this case, or person other than *amicus*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to this filing.

SUMMARY OF ARGUMENT

The CAVC's requirement for constructive possession, that materials be specific to the veteran, resulted in exclusion of a report prepared specifically for VA and indisputably relevant to Mr. Euzebio's disability. That standard inappropriately constricts "the record" in 38 U.S.C. § 7252(b), which has no specific-to-the-veteran requirement. It also inappropriately cabins VA's statutory duty to assist, counter to the pro-veteran canon, which animates the entire veterans' benefits system.

A new standard should be set, focusing on the claim, not the specific veteran. Guidance is provided by circumstances in which the Board and CAVC already consider materials not specific to a particular veteran. With that guidance and consistent with the statute and congressional intent, the standard for constructive possession should deem the Board to constructively possess evidence when it reasonably should be aware of its existence and relevance to the claim.

ARGUMENT

I. Congress's Solicitude to Claimants Forms the Bedrock of the Veterans Disability Compensation System.

Congress specifically designed the veterans' disability compensation claim system to be informal, non-adversarial, and generous to the veteran. *See Henderson v. Shinseki*, 562 U.S. 428, 440–41 (2011). It is fundamentally and uniquely a pro-claimant system designed to award benefits "to a special class of citizens, those who risked harm to serve and defend their country." *Barrett v. Principi*, 363 F.3d 1316,

1320 (Fed. Cir. 2004) (internal quotation omitted). Indeed, the VA's core values require that "VA employees will be truly veteran-centric by identifying, fully considering, and appropriately advancing the interests of veterans and other beneficiaries." 38 C.F.R. § 0.601(c). When enacting the Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 [hereinafter VJRA], "Congress intended to preserve the historic, pro-claimant system." *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998). The Federal Circuit has recognized that the "entire scheme," from initial adjudication through court proceedings, "is imbued with special beneficence from a grateful sovereign." *Barrett*, 363 F.3d at 1320 (emphasis added). The uniquely pro-claimant nature of the veterans' benefits system should drive and inform this Court's consideration of the standard for constructive possession with respect to "the record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b).

II. Congress Directed VA to Assist Veterans and Expansively Identified "the Record" for CAVC Review.

Congress's pro-claimant intent for the veterans claims system suffuses the statutory scheme. For example, Congress has imposed on VA a statutory duty to assist veterans in developing their claims. 38 U.S.C. § 5103A ("The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary."). By requiring the Secretary to "assist a claimant in obtaining evidence,"

Congress unambiguously requires VA to take an active role in developing "the record" of a veteran's claim. Congress requires VA to notify the claimant of all evidence necessary to substantiate a claim and to assist the claimant in obtaining that evidence, including identifying and collecting existing records. *See id.* § 5103(a)(1); *id.* § 5103A(b), (c). Frequently, VA must provide additional assistance, such as by furnishing a medical examination or opinion, which will also become part of the "record" of a veteran's claim. *See id.* § 5103A(d).

Because VA must assist a claimant in developing the record, the statutory duty to assist must inform what constitutes the record. Indeed, when adjudicating claims, the Board must base its decisions "on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation." 38 U.S.C. § 7104(a)(1). Similarly, the CAVC's review of Board decisions "shall be on the record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b). In both instances, Congress's clear intent is that the record encompasses at least that which VA itself is statutorily required to assist in obtaining or creating.

In addition, the language of section 7252(b) that CAVC's review is on the record of proceedings before the VA "Secretary *and* the Board" distinguishes between the Secretary and the Board and at the very least suggests a broader record than just the actual file in the possession of the Board. Based on the expansive

language, "the Secretary and the Board," Congress conferred on the CAVC review authority with respect to more than the particular paper in a specific veteran's file. In doing so, Congress set the floor on the CAVC's review of materials as the entire record of proceedings before, broadly, the Secretary and the Board. This confirms the CAVC's power to find that the Board had constructive possession of evidence or to take judicial notice of evidence. *See, e.g.*, *Hudgens v. McDonald*, 823 F.3d 630, 638, 638 n.3 (Fed. Cir. 2016) (taking judicial notice of at least seventeen Board decisions). *Smith v. Brown*, 35 F.3d 1516, 1524–26 (Fed. Cir. 1994) (considering regulatory history in challenge to interpretation of regulation).

Congress has carved out specific exceptions to CAVC review. Elsewhere in section 7252(b) itself, Congress expressly limited the scope of CAVC's review to that in section 7261 and stated that CAVC "may not review" the VA's Schedule for Rating Disabilities. 38 U.S.C. § 7252(b). These restrictions contrast with the same statutory section's broad identification of "the record of proceedings before the Secretary and the Board."

Another example of an exception to CAVC review is that a survivor's entitlement to accrued benefits is limited to that which they can demonstrate "an individual was entitled at death under existing ratings or decisions or *those based on evidence in the file at date of death*." 38 U.S.C. § 5121(a) (emphasis added); *see, e.g.*, *Hyatt v. Shinseki*, 566 F.3d 1364, 1367, 1371 (Fed. Cir. 2009). This reference

to "evidence in the file," which itself must be understood within the overall statutory scheme and therefore strictly construed, contrasts with the broad identification of "the record of proceedings before the Secretary and the Board" in section 7252(b). *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (quoting *Russello v. United States,* 464 U.S. 16, 23 (1983)) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). This difference supports that "the record of proceedings before the Secretary and the board" in section 7252(b) is broader than "evidence in the file" in section 5121(a).

Outside of these few, carefully articulated exceptions, the mandate is clear: VA and the CAVC must approach the development and adjudication of veterans' claims with a broad, wide-embracing view of what evidence substantiates those claims and should be considered part of "the record."

III. The CAVC Has Turned the Constructive Possession Doctrine Against Veterans with the Development of its Specific-to-the-Veteran Requirement.

It is against the backdrop of the pro-claimant nature of the veterans' benefits system and specific statutory directives, such as the duty to assist in § 5103A and non-limiting identification of "the record" in section 7252(b), that the judicial doctrine of "constructive possession" must be considered. The CAVC initially

developed the doctrine to effectuate Congress's pro-veteran, expansive intent regarding what evidence VA must address when adjudicating claims. Properly framed, it recognizes that CAVC "cannot accept the Board being 'unaware' of certain evidence, especially when such evidence is in possession of the VA, and the Board is on notice as to its possible existence and relevance." *Bell v. Derwinski*, 2 Vet. App. 611, 612 (1992) (per curiam) (quoting *Murincsak v. Derwinski*, 2 Vet. App. 363, 372 (1992)). Over time, the CAVC has strayed so far from that statute-reinforcing purpose as to flip the doctrine on its head. The history of the CAVC's departure from these principles follows.

In *Bell*, the veteran counter-designated four documents for inclusion in the record on appeal. *Id.* The CAVC ordered the Secretary to show cause as to why the items—a VA Form 119 Report of Contact, a letter from the veteran's VA doctor, a letter from the VA to the veteran, and the veteran's Statement in Support of Claim—were not part of the record. *Id.* The CAVC determined that "because three of the four items were clearly generated by the VA, the Secretary had constructive, if not actual, knowledge of those items." *Id.* at 613. Additionally, "[t]he fourth item was submitted to the VA by appellant as part of her claim." *Id.* "All four items pre-date the BVA opinion now on appeal to this Court." *Id.* The Court held that under 38 U.S.C. § 7252(b), all four items "were 'before the Secretary and the Board' when the BVA decision was made." *Id.* The CAVC articulated the guiding principle as:

"where the documents proffered by the appellant are within the Secretary's control and could reasonably be expected to be a part of the record 'before the Secretary and the Board,' such documents are, in contemplation of law, before the Secretary and the Board." *Id.* Additionally, "[i]f such material *could be* determinative of the claim and was not considered by the Board, a remand for readjudication would be in order." *Id.* To this extent, *Bell* gets it right.

Bell, however, suffers from an infirmity that has grown to plague veterans. In dictum, and without any meaningful analysis, the CAVC stated that it "is precluded by statute from considering any material which was not contained in the record of proceedings before the Secretary and the Board." *Id.* at 712 (citing 38 U.S.C. § 7252(b); *Rogozinski v. Derwinski*, 1 Vet. App. 19 (1990)).[2]

The CAVC compounded its misinterpretation of section 7252(b) over the next nearly three decades. In *Bowey v. West*, 11 Vet. App. 106 (1998), the CAVC quoted *Bell*'s conclusory dictum as canon and also quoted *Murillo v. Brown*, 8 Vet. App. 278 (1995), for the proposition that "where there is 'no basis, evidentiary or otherwise, to conclude that the documents . . . were before the Board when it rendered its decision,' the documents cannot serve as part of the [Record on

[2] The single decision on which *Bell* relies for this conclusion, *Rogozinski*, is also bereft of meaningful analysis. *See* 1 Vet. App. at 20.

Appeal]." *Bowey*, 11 Vet. App. at 108 (quoting *Murillo*, 8 Vet. App. at 279).[3] In *Bowey*, the veteran attempted to introduce into the appeal record: (1) a publication prepared for the Defense Nuclear Agency by the National Institute for Occupational Safety and Health, entitled *Radiation Dose Reconstruction U.S. Occupation Forces in Hiroshima and Nagasaki, Japan* (the NIOSH Report); and (2) an excerpt from a treatise, *Medical Effects of Ionizing Radiation*, to support his claim for disability based on radiation exposure. *Id.* at 107. The CAVC refused constructive possession of the documents by the Board because they were "too tenuous[ly]" connected to the veteran's case. *Id.* at 109.[4]

Properly considered, arguments of constructive possession before the CAVC address not what *CAVC* should address as part of its decision—that, more

[3] *Murillo* is mostly inapposite to constructive possession, standing for the proposition that CAVC may not in the first instance conclude that the Board erred based on "additional arguments and new medical evidence" post-dating the Board's decision on appeal. *See Murillo*, 8 Vet. App. at 278, 279. The closest *Murillo* comes to addressing constructive possession is to conclude that such post-dated materials submitted to the Board Chairman in connection with a request for reconsideration are not part of the record on appeal of the underlying Board decision. *See id.* at 279 (holding, in this context, that "[t]he Chairman is neither actually nor constructively 'the Secretary' nor 'the Board'").

[4] In dissent, Judge Steinberg noted that the court had misapplied *Bell* with respect to the NIOSH Report, stating that "*any* document that satisfies [*Bell*'s] two criteria—one that is (1) within the Secretary's control and (2) could reasonably have been expected to be part of the record" should be considered constructively possessed by the CAVC. *Bowey*, 11 Vet. App. at 110. Judge Steinberg noted that the NIOSH Report was actually possessed by four VA Medical Centers and four VA Central Office officials, including the Chief Benefits Director. *Id.* at 111.

appropriately, is judicial notice—but instead what materials *BVA* should have addressed as part of its decision. *See* 38 U.S.C. § 7261(c) ("In no event shall findings of fact made by the Secretary of the Board of Veterans' Appeals be subject to trial de novo by the Court."). *Bowey*'s reliance on *Murillo* conflated these principles. *See Bowey*, 11 Vet. App. at 108 ("The reason for this rule [that, where there is no basis, evidentiary or otherwise, to conclude that the documents were before the Board when it rendered its decision, the documents cannot serve as part of the Record on Appeal] is that 'for the Court to base its review on documents not included in the Board's calculus at the time it rendered its decision would render the Court a fact finder de novo, exceeding its authority under the statutory scheme.'" (quoting *Murillo*, 8 Vet. App. at 280)).

Bowey's error marked an acceleration point for the CAVC's departure from an appropriate interpretation of "the record" in section 7252(b) with respect to constructive possession. In contrast to *Bell*'s generally permissive analysis—with a stray restrictive comment in dictum—*Bowey* recast the CAVC's approach as generally *restrictive* but for a few *permissive* exceptions identified as coming from specific language in *Bell*. Essentially, *Bowey* swapped the rule with the exception.

This is demonstrated in subsequent cases. In *Goodwin v. West*, 11 Vet. App. 494 (1998) (per curiam), the CAVC framed its analysis as: the "Court is precluded by statute from considering any material which was not contained in the 'record of

proceedings before the Secretary and the Board," except that, "*in certain circumstances*, records may be deemed to be constructively before the Board." *Goodwin*, 11 Vet. App. at 496 (emphasis added). *Goodwin* characterized *Bell* as within that *exception*. *See id.* In *Goodwin*, the appellant wanted documents generated by the VA with respect to a claim filed by another veteran included in the record. The CAVC refused constructive possession because the documents "relate[d] to claims for VA benefits for an individual other than the appellant" and thus could not reasonably be expected to be part of the record. *Id.* at 495, 496. In doing so, the *Goodwin* court became the first to impose another requirement on constructive possession: specificity to that claimant.

The CAVC formalized its specific-to-the-veteran requirement in *Monzingo v. Shinseki*, 26 Vet. App. 97 (2012) (per curiam). There, the veteran appealed a denial of a claim for benefits based on hearing loss, seeking to add to the record on appeal two documents: (1) a 2006 report, titled *Noise and Military Service: Implications for Hearing Loss and Tinnitus*, prepared by the Committee on Noise-Induced Hearing Loss and Tinnitus Associated with Military Service from World War II to the Present[5]; and (2) a 1982 report, titled *Tinnitus: Facts, Theories, and Treatments*,

[5] The Committee on Noise-Induced Hearing Loss and Tinnitus Associated with Military Service from World War II to the Present is a committee of the National Academy of Medicine (formerly, the Institute of Medicine), which was congressionally mandated to assess hearing loss due to noise exposure and provide recommendations to the VA. *See Noise-Induced Hearing Loss and Tinnitus*

prepared by a group from the Committee on Hearing, Bioacoustics, and Biomechanics of the Commission on Behavioral and Social Sciences and Education of the National Research Council.[6] *Id.* at 100. In addressing the law of constructive possession, the CAVC stated that "even when a document is generated by VA, it will not be considered constructively before the Board in a particular claimant's case unless the document has a direct relationship to the claimant's appeal." *Id.* at 102. The CAVC held that the reports were not constructively possessed by the Board because they were "not *specific to* Mr. Monzingo." *Id.* at 103 (emphasis added).

The CAVC has in other cases continued to impose its specific-to-the-veteran requirement from *Monzingo* to limit the record. *See, e.g.*, *Law v. Wilkie*, Case No. 18-1281, 2019 U.S. App. Vet. Claims LEXIS 1752, at *2–*3 (Vet. App. Oct. 1, 2019) (granting VA motion to strike reference to sleep study listed on VA website based on *Monzingo*); *Parrott v. O'Rourke*, Case No. 17-4577, 2018 U.S. App. Vet. Claims LEXIS 906, at *5–*11 (Vet. App. Jun. 1, 2018) (refusing to consider studies

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Associated with Military Service from World War II to the Present, NAT'L ACADS., http://nationalacademies.org/hmd/Activities/Veterans/MilitaryHearingLoss.aspx (last updated Oct. 4, 2018).

[6] The Committee on Hearing, Bioacoustics, and Biomechanics of the Commission on Behavioral and Social Sciences and Education of the National Research Council is a committee of the National Research Council, whose members are drawn from the National Academy of Sciences, the National Academy of Engineering, and the National Academy of Medicine (formerly the Institute of Medicine). *See* DENNIS MCFADDEN, TINNITUS: FACTS, THEORIES, AND TREATMENTS, at ii (NAT'L ACAD. PRESS 2006).

as part of the record based on *Monzingo* despite Secretary's agreement that medical studies cited in the Federal Register reflect VA's position on certain issues); *Thompson v. McDonald*, Case No. 14-2356, 2015 U.S. App. Vet. Claims LEXIS 1790, at *1–*3 (Vet. App. May 5, 2015) (ruling that an August 2004 report by the Health Physics Society numbered 'PS010-1' and titled "Radiation Risk in Perspective," cited in an expert opinion relied on by the Board, was not part of the record based on *Monzingo*); *Estes v. Shinseki*, Case No. 12-0660, 2013 U.S. App. Vet. Claims LEXIS 916, at *8–*12 (Vet. App. Jun. 7, 2013) (ruling that a report titled "Veterans and Agent Orange: Update 2010," published by the Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides,[7] was not constructively before VA based on *Monzingo*).[8]

The CAVC's specific-to-the-veteran requirement set the stage for this case and whether the Board should have considered the report, *Veterans and Agent Orange: 2014 Update* (the 2014 Update), prepared specifically for VA by the National Academy of Sciences with information relating to Mr. Euzebio's disability.

[7] The Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides is a committee of the National Academy of Medicine (formerly, the Institute of Medicine), which was congressionally mandated to conduct a comprehensive review of scientific and medical literature on health effects from exposure to Agent Orange and report the same to VA. *See Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides*, NAT'L ACADS., http://www.nationalacademies.org/hmd/Activities/Veterans/HealthEffectsVietnamVeteransHerbicides.aspx (last updated Feb. 26, 2020).

[8] This is not an exhaustive list.

The CAVC held that "our caselaw is clear that, even if VA is aware of a report and the report contains general information about the type of disability on appeal, that is insufficient to trigger the constructive possession doctrine; there must be a *direct relationship* to the claim on appeal." *Euzebio v. Wilkie*, 31 Vet. App. 394, 402 (2019) (citing *Monzingo*, 26 Vet. App. at 102). Responding to the dissent, the majority in *Euzebio* stated that "a straightforward application of *Monzingo* leads to the conclusion that the 2014 Update was not constructively before the Board. It is *not specific to the appellant* and the only connection between the report and the appellant is that it generally discusses whether a myriad of conditions may be related to [Agent Orange] and the appellant was exposed to AO." *Id*. at 403 (emphasis added).

IV. The CAVC's Specific-to-the-Veteran Test Is Contrary to Section 7252(b) and the Pro-Veteran Canon.

As substantially narrowed, the CAVC's current standard for constructive possession conflicts with the statute and with the pro-veteran canon.

A. The CAVC's Requirement Conflicts with the Statute.

Congress defined CAVC's review as "on the record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b). This language is not limited to materials specific to the veteran. The CAVC's restrictive standard of constructive possession thus cannot stand because it engrafts on the statute a requirement that does not exist and that Congress could not have intended. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798–99 (1973) (in the context of an EEOC

complaint, refusing to engraft additional requirements on the statute); *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941) ("[I]t is not our function to engraft on a statute additions which we think the legislature logically might or should have made."); *see also Ward v. Wilkie*, 31 Vet. App. 233, 240 (2019) ("The Secretary may not add restrictions to a regulation [or statute] where they do not exist, 'because, in doing so, the Board imposes a greater burden on a claimant than the law does.'" (quoting *English v. Wilkie*, 30 Vet. App. 347, 353 (2018))).

In addition, VA's statutory duty to assist claimants has been construed by this Court as extending far beyond the CAVC's current specific-to-the-veteran requirement, mandating the Secretary to "make reasonable efforts to assist a claimant in obtaining evidence *necessary to substantiate the claimant's claim* for a benefit under a law administered by the Secretary." 38 U.S.C. § 5103A(a)(1) (emphasis added); *see Jones v. Wilkie*, 918 F.3d 922 (Fed. Cir. 2019).

The statutory duty to assist, to be sure, is not boundless. "The Secretary is not required to provide assistance to a claimant . . . if *no reasonable possibility* exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2) (emphasis added); *see Sullivan v. McDonald*, 815 F.3d 786, 792 (Fed. Cir. 2016) ("VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate

the claim." (quoting 38 C.F.R. § 3.159(d))). This Court has confirmed, however, that this exception is narrow, stating that "to trigger the VA's duty to assist, a veteran is not required to show that a particular record exists or that such a record would independently prove his or her claim." *Jones*, 918 F.3d at 926. Based on the statutory duty to assist, if VA is aware of evidence that may aid in substantiating a claim, VA must provide it to the claimant regardless of whether that evidence is specific to the claimant.

In assessing constructive possession here, however, the CAVC considered whether the document was "specific to the appellant" or bore a "closer relationship to the appellant." *Euzebio*, 31 Vet. App. at 402. The CAVC thus focused not on the content of the information and how it might impact or substantiate a veteran's claim but on the specificity of the information to the veteran himself. This was wrong because it too narrowly constricted "the record" in § 7252(b) and the duty to assist in section 5103A.

B. The CAVC's Requirement Conflicts with the Pro-Veteran Canon.

Courts have long recognized and endorsed a pro-veteran canon, which demands a liberal construction of statutes conferring veterans' benefits. *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (holding that statutes affording benefits to veterans are "always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"); *see also Fishgold v.*

Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) (instructing that courts must "give each [statutory provision] as liberal a construction for the benefit of the veteran" as the statutory scheme permits).

The Supreme Court recently endorsed the pro-veteran canon in *Henderson*. 562 U.S. at 440–41. Noting that the veterans claims process is "designed to function throughout with a high degree of informality and solicitude for the claimant," *id.* at 431 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)), the Court held that because a statute was not stated in jurisdictional terms, it would be construed in the veteran's favor. *Id.* at 438; *see also id.* at 441 ("We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21 n.9 (1991)); *accord Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[I]nterpretive doubt is to be resolved in the veteran's favor.").

In doing so, the Court stayed true to Congress's intent for the claims system to favor the veteran. *Henderson*, 562 U.S. at 440 ("'The solicitude of Congress for veterans is of long standing.' And that solicitude is plainly reflected in the VJRA, as well as in subsequent laws that 'place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of [Veterans Administration (VA)] decisions.'" (quoting *United States v. Oregon*, 366 U.S. 643, 647 (1961)).

This Court, too, has repeatedly endorsed the pro-veteran canon. *Comer v. Peake*, 552 F.3d 1362, 1364 (Fed. Cir. 2009) (determining that VA's duty to sympathetically and fully construe a *pro se* veterans filings applies to an appeal to the Board following a rating determination); *Andrews v. Nicholson*, 421 F.3d 1278, 1283 (Fed. Cir. 2005) (holding that VA's duty to read pro se filings sympathetically applies to CUE motions); *Szemraj v. Principi,* 357 F.3d 1370, 1373 (Fed. Cir. 2004) ("[W]ith respect to all pro se pleadings, [the Board and the Secretary are required to] give a sympathetic reading to the veteran's filings."); *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001) (noting that Congress has mandated that VA is to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits and holding that VA is required to consider a CUE claim using the same standard); *see also Procopio v. Wilkie*, 913 F.3d 1371, 1382–87 (2019) (en banc) (O'Malley, J., concurring) (addressing why, "[w]hen the pro-veteran canon and agency deference come to a head, it is agency deference—the weaker of two doctrines at any level—that must give way").

The pro-veteran canon requires that section 7252(b) and, specifically, what can constitute "the record of proceedings before the Secretary and the Board," to be liberally construed. *Sursely v.* Peake, 551 F.3d 1351, 1357 (Fed. Cir. 2009) ("[I]n the face of statutory ambiguity, we must apply the rule that 'interpretive doubt is to be resolved in the veteran's favor.'" (quoting *Brown v. Gardner*, 513 U.S. 115, 118

(1994))). It is clearly more favorable to veterans if "the record" may include materials that relate to their claims but which may not be specific to them. The liberal construction demanded by the pro-veteran canon does not permit the CAVC's current specific-to-the-veteran test.

V. VA Routinely Considers Information Neither Generated by VA Nor Specific to the Claimant.

In reaffirming its specific-to-the-veteran requirement in *Euzebio*, the CAVC recognized salient features of the 2014 Update. In particular, it "was created for VA pursuant to a congressional mandate, which directed the Secretary to enter into an agreement with the NAS [National Academy of Sciences] to review and summarize scientific evidence concerning the association between exposure to herbicides used in Vietnam during the Vietnam era and diseases suspected to be associated with such exposure." *Euzebio*, 31 Vet. App. at 399. The dissent further noted that Agent Orange updates, such as the 2014 Update, "are important for the Agency because Congress made them so, expressly and unequivocally." *Id*. at 410. Indeed, the CAVC previously recognized that for veterans who served in Vietnam, Congress had, until shortly before the 2014 Update's publication, "directed the Secretary of Veterans Affairs (Secretary) to consider reports from the National Academy of Sciences and 'all other sound medical and scientific information and analyses available to the Secretary' . . . and prescribe regulations providing for presumptive service connection for conditions where a positive association exists between exposure to

herbicide agents and the occurrence of the disease in humans." *Stefl v. Nicholson*, 21 Vet. App. 120, 122 (2007); *see also* 38 U.S.C. § 1116(b)(2), (c)(1)(A), (e). Based on these facts alone, the 2014 Update is well within the bounds of materials that Congress intended for the Board and CAVC to consider, irrespective of whether VA had associated a copy of the materials with the claims file of a specific veteran.

Sharing characteristics of the 2014 Update, the Board and CAVC routinely consider information that is neither generated by the VA nor specific to a veteran, the touchstones of the CAVC's current constructive possession doctrine. Some examples follow.

SHAD. The VA maintains a website addressing claims in connection with service in Project Shipboard Hazard and Defense (SHAD). *Exposure Through Project 112 or Project SHAD*, U.S. DEP'T VETERANS AFFAIRS, https://www.va.gov/disability/eligibility/hazardous-materials-exposure/project-112-shad/ (last updated Sept. 27, 2019). The website directs veterans to declassified DoD fact sheets with information about different test sites, ships, or units involved in the testing. *Project 112/SHAD Fact Sheets*, HEALTH.MIL, https://health.mil/Military-Health-Topics/Health-Readiness/Environmental-Exposures/Project-112-SHAD/Fact-Sheets (last accessed Feb. 25, 2020). This information is neither generated by the VA nor specific to the claimant. And when a claimant is unable to provide this information, the CAVC has required VA to do

so. *See Mattern v. Shinseki*, Case No. 08-0291, 2010 U.S. App. Vet. Claims LEXIS 814, at *6 (Vet. App. Apr. 29, 2010) ("[T]he examiner's conclusion leaves the Court with the impression that he may be providing an uniformed first impression, while leaving the task of medical research to the lay appellant, rather than providing an assessment arrived at after diligently seeking relevant medical information.").

CHECO Report. When a veteran files a claim for benefits based on exposure to Agent Orange in Thailand during the Vietnam era, VA consults the Project Contemporary Historical Examination of Current Operations Southeast Asia (or CHECO) Report, Base Defense in Thailand, which was produced by the DoD. This information is neither generated by VA nor specific to the claimant. And when a claimant is unable to provide this information, the CAVC has required VA to do so. *See Gaddis v. McDonald*, Case No. 15-2944, 2016 U.S. App. Vet. Claims LEXIS 1729, at *11 (Vet. App. Nov. 9, 2016) ("Although the Secretary contends that the Board had no duty to discuss the CHECO Report because it was not in the record before the Board, the Court concludes that the document was constructively before the Board and therefore the Board should have addressed it.").

Ships List. To obtain presumptions entitled to veterans under the Agent Orange Act, a claimant may need to prove where he or she was stationed using the VA's Ships List. *Navy and Coast Guard Ships Associated with Service in Vietnam and Exposure to Herbicide Agents*, U.S. DEP'T VETERANS AFFAIRS (Oct. 28, 2019),

https://www.va.gov/shiplist-agent-orange.pdf. Though the Ships List is VA-generated, it identifies ships exposed to Agent Orange and is not specific to a particular claimant. Even so, the CAVC has taken judicial notice of it in adjudicating relevant claims. *See Wofford v. McDonald*, Case No. 14-0095, 2014 U.S. App. Vet. Claims LEXIS 2039, at *8–*9 (Vet. App. Dec. 11, 2014) (taking judicial notice of the Ships List to show that applicant was not entitled to benefits).

Mustard Gas and Lewisite. Congress passed the Harry W. Colmery Veterans Educational Assistance Act in 2017, which, in part, requires VA to reconsider all previously denied claims for alleged full body exposure to mustard gas and lewisite. Pub. L. No. 115-48, 131 Stat. 996–99, § 502 (2017). In doing so, Congress instructed VA to consider, among other things, "information in the report from the Secretary of Defense under subsection (b)(2)," which required the Secretary of Defense, within 180 days of enactment, to submit a report detailing where and when mustard gas and lewisite testing occurred and the number of members of the Armed Forces who experienced full-body exposure. *Id.* § 502(a)(4)(A)(iv), 502(b)(2). This document is neither VA-generated nor specific to a particular claimant.

Radiation Exposure. When a veteran files a benefits claim based on an illness caused by radiation, VA automatically seeks information from either the military branch of service or the Defense Threat Reduction Agency of the DoD to

determine an approximate dosage of radiation that veterans were exposed to at a given service station. *Ionizing Radiation Exposure*, U.S. DEP'T VETERANS AFFAIRS, https://www.va.gov/disability/eligibility/hazardous-materials-exposure/ionizing-radiation/ (last updated Sept. 27, 2019). This information is not VA-generated or specific to a particular claimant.

The above examples demonstrate that information that is neither generated by VA nor specific to a particular claimant is fairly routinely considered as part of "the record," supporting a standard of constructive possession without these requirements.

VI. A Less Restrictive Standard of Constructive Possession Should be Adopted.

The factors noted above, including: (1) the broad identification in section 7252(b) of "the record of proceedings before the Secretary and the Board" without being specific to a particular claimant, (2) sections 5301 and 5301A, mandating VA's duty to notify and assist veterans in developing their claims, (3) the pro-veteran canon, and (4) other similar circumstances in which the Board and CAVC will consider information that is neither generated by VA nor specific to a particular claimant all support a less restrictive standard for constructive possession.

NVLSP respectfully submits that the following standard approximates Congress's intent for 38 U.S.C. § 7252(b): The Board constructively possesses evidence when the Board reasonably should be aware of its existence and relevance

to the type of claim at issue. Certainly, the Board reasonably should be aware of evidence in VA's possession or control. It probably also should, as a matter of law, be aware of evidence to which VA directs claimants through, for example, its website. And certainly the Board reasonably should be aware of a document's relevance to a type of claim when the document is or updates one "created for VA pursuant to a congressional mandate" that directed the Secretary to enter into an agreement with the document's author "to review and summarize scientific evidence concerning" that type of claim—such as claims based on herbicide exposure causing a particular disease that the document addresses.

Indeed, the kinds of materials addressed above would satisfy this standard: (1) those related to the claim and possessed by the VA by congressional directive, such as, for example, the Report of the Secretary of Defense in adjudication of Mustard Gas claims, NAS reports related to Agent Orange exposure, and similar documents that Congress has directed VA to receive in adjudication of benefits claims related to certain illnesses or exposures; (2) those VA advises veterans to consider for certain types of claims, such as the Ships List for Agent Orange claims, DoD materials in SHAD cases, and DoD materials in ionizing radiation cases; and (3) those of such notoriety that VA is generally aware of and frequently refers to in adjudicating certain claims, such as, for example, the CHECO report in Thailand herbicide exposure cases. The touchstone, however, is reasonableness.

This standard would be true to congressional intent, true to the original test set forth in *Bell*, and speak in the familiar language of "reasonableness." Adoption of this standard—or a similarly generous standard—is of the utmost importance to veterans, especially given that the CAVC's current regime almost exclusively prejudices *pro se* claimants, making access to benefits contingent on obtaining savvy (or lucky) representation. *See Euzebio*, 31 Vet. App. at 408–09 (Allen, J., dissenting) (showing, through thought exercise, that the current constructive possession standard would disproportionately affect *pro se* claimants).

CONCLUSION

This Court should reverse the judgment of the Veterans Court and adopt a standard of constructive possession jettisoning its specific-to-the-veteran requirement and instead deeming the Board to constructively possess evidence when it reasonably should be aware of its existence and relevance to the type of claim at issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Federal Circuit Rule 32(a). The brief contains 6,152 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using MS Word 2013 in a 14-point Times New Roman font.

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