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,

On Appeal from the United States Court of Appeals for Veterans Claims, No. 17-2879, Hon. Amanda L. Meredith

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BRIEF OF *AMICUS CURIAE* NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM SUPPORTING CLAIMANT-APPELLANT

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February 28, 2020

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

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Robert M. Euzebio **v.** Robert Wilkie

Case No. 20-1072

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
NLSVCC	same	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:

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

Euzebio v. Wilkie, No. 17-2879, Court of Appeals for Veterans Claims (2019)

02/28/2020
Date

/s/ Hillary A. Wandler
Signature of counsel

Please Note: All questions must be answered

Hillary A. Wandler
Printed name of counsel

cc: Counsel of Record

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IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

Amicus Curiae National Law School Veterans Clinic Consortium ("NLSVCC"), a 501(c)(3) organization, submits this brief in support of the position of the Claimant-Appellant, Robert M. Euzebio. NLSVCC's Board authorized the filing of this brief.[1] All parties have consented to the filing of this brief.

NLSVCC is a collaborative effort of the nation's law school legal clinics, not for profit organizations, and individual attorneys dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. NLSVCC's mission is to gain support and advance common interests with VA, Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

[1] This brief's primary authors are identified in the signature block. NLSVCC thanks the following for their valuable help: Michele Vollmer of Penn State Law, Samantha Stiltner of UIC John Marshall Law School, and Angela Drake of the University of Missouri School of Law; Professor Larry Howell of the Alexander Blewett III School of Law at the University of Montana; and students Alexandra DeBonte and Abhipsa Dash of Penn State Law.

NLSVCC exists to promote the fair treatment of veterans. It therefore is keenly interested in this case and is grateful for the opportunity to advocate in support of veterans who have been unfairly impacted by the erroneous interpretation and implementation of 38 U.S.C. § 7252(b).

STATEMENTS PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

Under Federal Rule of Appellate Procedure 29(a)(4)(E) and Federal Circuit Rule 29(a), the NLSVCC states:

a) No party's counsel has authored this brief in whole or part;

b) No party or party's counsel has contributed money intended to fund the preparation or submission of this brief; and

c) No other person has contributed money intended to fund the preparation or submission of this brief.

ARGUMENT

"Anyone who isn't confused doesn't really understand the situation."
Edward R. Murrow

Appellant, Robert M. Euzebio, is a U.S. Navy veteran who served in the Vietnam War, and is now seeking compensation for his service-connected disability. In deciding Mr. Euzebio's claim, the Department of Veterans Affairs ("VA") actually possessed—and the Board of Veterans' Appeals ("Board") actually referenced—relevant scientific evidence about a statistical association between certain diseases and herbicide exposure. In fact, both VA and the Board had referred to this evidence, the National Academies of Sciences Agent Orange Update, in internal procedure manuals in the very sections decision-makers would need to apply in deciding Mr. Euzebio's claim, and VA had referred to the source in thirty published documents in the Federal Register over the past fifteen years—this was no obscure source of information. In Mr. Euzebio's case, this source met the minor threshold to trigger VA's duty to obtain a medical nexus opinion. Yet the Board, and later CAVC, concluded it was not constructively in the record. Like many other veterans, Mr. Euzebio did not know of or possess the information, even though it may have kept his claim alive.

VA has a duty to assist a veteran in developing a claim for benefits under 38 U.S.C. § 5103A. This duty encompasses responsibilities such as obtaining necessary, relevant evidence and providing for a medical nexus opinion linking the disability to military service. The decision below, however, concluded the scope of this well-recognized statutory duty did not encompass Mr. Euzebio's claim. The Court of Appeals for Veterans Claims ("CAVC") arrived at its decision by maintaining that the modicum of evidence necessary to trigger a VA medical nexus opinion was absent, notwithstanding the fact VA had relevant evidence in its possession and the Board of Veterans' Appeals ("Board") actually referenced it in its denial decision. To the detriment of veteran claimants, CAVC narrowed the applicability of the constructive possession doctrine with respect to relevant evidence. By limiting what evidence is relevant and before the Board, without authority, CAVC announced an arbitrary and erroneous legal requirement.

The legal requirement first articulated by CAVC in *Monzingo v. Shinseki*, 26 Vet.App. 97, 102 (2012), prejudiced Mr. Euzebio and harms countless other veterans seeking benefits. Had counsel familiar

with VA's claims adjudication system represented Mr. Euzebio in submitting his initial claim, this matter would not likely await this Court's resolution. But in a system designed as uniquely pro-claimant and non-adversarial, the approval of a claim should not turn on the veteran's representation status—particularly in the face of history and statutes placing affirmative duties on VA. Congress intended for veterans to have the ability to navigate the system *pro se*, supported by employees of the United States' second largest federal agency. At the expense of Mr. Euzebio and his time, however, this case presents a unique opportunity to correct CAVC's improper and inequitable legal requirement. This requirement lacks any articulable definition or method for a VA claims examiner to apply and thus leads to inconsistent application and absurd results.

Implementing a "direct relationship" requirement to deem evidence before the Board, and disregarding evidence constructively before the Board, flies in the face of the non-adversarial, pro-claimant system designed by Congress. Nor does the "direct relationship" requirement constitute a sound legal standard. Rather, it lacks statutory and regulatory support; undermines the scope of VA's duty to

assist under the low threshold established in *McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006); and produces absurd results. Even disregarding technological tools readily available to VA, the government often possesses key relevant information as a result of its significant resources, particularly in comparison to the veteran claimant. Congress articulated what it expects from VA and charged the agency to do. However, the "direct relationship" requirement allows and approves inconsistent decision-making that is contrary to the legislative intent.

The time has come to fix this fundamentally unfair and confusing legal fiction.

I. THE "DIRECT RELATIONSHIP" REQUIREMENT IS IRRECONCILABLE WITH A NON-ADVERSARIAL AND UNIQUELY PRO-CLAIMANT SYSTEM.

A. CAVC's interpretation of 38 U.S.C.§ 7252(b) is inconsistent with the uniquely pro-claimant scheme of all veterans law statutes read as a whole.

Congress' design of the veterans' benefits system, and the history, planning, and policy behind its development, makes clear that the arbitrary "direct relationship" requirement announced by CAVC cannot stand. Nearly 155 years ago, President Lincoln promised "[t]o care for

him who shall have borne the battle, and for his widow, and his orphan." Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865). VA has embraced that promise as its Mission Statement. *About VA*, U.S. Dep't of Veterans Affairs, https://www.va.gov/ABOUT_VA/index.asp (last updated June 21, 2019). The tradition of assisting disabled veterans stems back to 1636 with the Pilgrims of Plymouth Colony. *Id.* at https://www.va.gov/about_va/vahistory.asp. This tradition continued through VA's establishment in 1989 under the Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988). Later, Congress established CAVC and provided for judicial review of unfavorable VA benefits decisions. Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988). "Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits." H.R. Rep. No. 963, 100th Cong. (1988) ("This is particularly true of service-connected disability compensation."). Describing the beneficial, *ex parte* adjudication system, Congress stated its expectation that VA must "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits" and give the veteran claimant "the benefit of

any reasonable doubt" because "[i]n such a beneficial structure there is no room for . . . adversarial concepts." *Id.*

This Court and the Supreme Court of the United States acknowledge that Congress has constructed and preserved a "uniquely pro-claimant" and non-adversarial statutory veterans' benefits framework. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) ("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant.") (internal citation omitted)). *See also Brown v. Gardner*, 513 U.S. 115, 118 (1994) (stating "interpretive doubt [regarding statutes] is to be resolved in the veteran's favor") (internal citation omitted); *Walters v. Nat. Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985) ("The process is designed to function throughout with a high degree of informality and solicitude for the claimant."). The Supreme Court of the United States more recently has acknowledged the distinctive, veteran-favorable scheme. *See Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (stating the "contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic"). VA proceedings are

"informal and nonadversarial[,]" and the "VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims." *Id*.

But decisions like the one below do not fit within the pro-veteran scheme and have no place in it. As illustrated by practical examples provided in this brief, the likelihood of a different outcome for represented veterans based on this decision only reinforces this problem. That result is enigmatic in this informal system.[2] The pro-claimant foundation laid by Congress and VA's own mission do not sanction the "direct relationship" requirement, for it perpetuates inconsistent and absurd results for veterans relying on the country's promise to care for them.

The legal requirement CAVC relied on is also at odds with, and risks eroding, VA's duty to assist. Congress enacted the Veterans Claims Assistance Act of 2000 ("VCAA"), clarifying and codifying VA's

[2] *Cf.* Benjamin P. Pomerance & Katrina J. Eagle, *The Pro-Claimant Paradox: How the United States Department of Veterans Affairs Contradicts Its Own Mission*, Widener L. Rev. 1, 5 (2017) (maintaining "VA has lost its way, departing from the purposes for which it was created and placing roadblocks in the pathways of the very constituents whom Congress created this agency to serve").

long-standing duty to assist veteran claimants. Pub. L. No. 106-475, 114 Stat. 2096 (2000). The VCAA was a product of congressional frustration with VA and the rate of claim denial. *See* 146 Cong. Rec. H9917 (daily ed. Oct 17, 2000). Representative Evans said:

> I am particularly concerned with the number of cases reviewed by Committee staff in which VA has evidence of a current disability and an indication of a potential in-service incident or series of events which may have caused or aggravated the disability, but VA has failed to obtain a medical opinion concerning the relationship between the two . . . . Veterans seeking to establish their entitlement to benefits they have earned as a result of their service to our country **deserve to have their claims decided fairly and fully based upon all relevant and available evidence**.

Id. (emphasis added). Congress intended for VA to give veteran claimants "whatever assistance is necessary." 146 Cong. Rec. S9213 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller). "The system to provide benefits to veterans was never intended to be adversarial or difficult for the veteran to navigate." *Id.* at S9212.

The VCAA also eliminated the prior, problematic "well-grounded claim" standard. Legislative history shows Congress' concern for veterans who just gave up on their claims, "feeling betrayed by the government they have served so honorably." 146 Cong. Rec. H9916 (daily ed. Oct 17, 2000) (statement of Rep. Evans) ("While some claims

may ultimately be denied, by obtaining and reviewing all of the **relevant** evidence first, veterans will be assured that their claims have been fairly and fully considered.") (emphasis added)). Title 38 U.S.C. § 5107(b) clearly imposes the "benefit of the doubt" standard for evaluating evidence. This fifty/fifty evidentiary standard, which is less than a preponderance of the evidence needed in most non-veteran civil law claims, evidences congressional intent in further refining the statutory scheme to favor veteran claimants.

Taken together, Congress' development of the veterans' benefits system requires much more of VA than the decision below required. The "direct relationship" requirement undermines the duty to assist because it imposes a higher standard than relevancy, as required in 38 U.S.C. § 5103A and intended by Congress.

The "direct relationship" requirement *Monzingo* imposed and *Euzebio v. Wilkie*, 31 Vet.App. 394 (2019), relied on likewise lacks statutory or regulatory support. *Monzingo* outlined CAVC's history with the constructive possession doctrine as an exception to the general rule that CAVC limits its review to documents before the Board. *See* 26 Vet.App. at 101–02. However, nowhere in *Monzingo* or

Euzebio did CAVC point to any statutory or regulatory authority for narrowing the doctrine with the "direct relationship" requirement. Nor does the plain language of 38 U.S.C. § 7252(b) mention or require it. While that statute limits review to the "record of proceedings before the Secretary and the Board[,]" CAVC has long recognized that it "cannot accept the Board being *unaware* of certain evidence, especially when such evidence is in the possession of VA, and the Board is on notice as to its possible existence and relevance." *Barclay v. Brown*, 4 Vet.App. 161, 165 (1993) (emphasis added) (internal quotations omitted).

Other non-precedential cases further illustrate the inconsistent application of the "direct relationship" requirement. For example, in *Clark v. Shinseki*, 2013 WL 6729512 (Vet. App. Dec. 20, 2013), a case reminiscent of *Euzebio*, CAVC held the Board's statement of reasons or bases inadequate as a matter of law when it declined to seek a VA medical nexus examination under 38 U.S.C. § 7104(d)(1) and *McLendon*. In *Clark*, the veteran claimant sought disability benefits for hypertension secondary to a service-connected condition. *Id.* at *1. On appeal, CAVC agreed with the claimant that the National Academies of

Sciences, Engineering, and Medicine's ("NAS") *Veterans and Agent Orange: Update 2010*[3]—which acknowledged "limited or suggestive evidence of an association between Agent Orange exposure and hypertension[,]"—was "particularly **relevant**." *Id.* *3 (emphasis added) (internal quotations omitted) (ordering the Board to "address whether the Secretary's statements in the Federal Register satisfy [*McLendon*'s low threshold] of indicating that [the claimant's] hypertension may be related to his in-service Agent Orange exposure and, if so, provide the appellant with a medical opinion to address that theory of causation"). Notwithstanding that the 2010 NAS Update did not appear anywhere in the record, the *Clark* Court found it relevant because the Secretary made statements in the Federal Register about it. *Id.*

The *Clark* decision came after *Monzingo*, applying a relevancy-like standard, and did not once state the "direct relationship" requirement between the document and the appeal. Thus, the analysis was more akin to the original *Bell v. Derwinski*, 2 Vet.App. 611, 612–13 (1992) standard—that the NAS report was within VA's control and was

[3] The brief analyzes the history and relevancy of the NAS Updates *infra* in Sec. I. subsec. B.

reasonably expected to be part of the record—because the *Clark* Court concluded that VA's acknowledgement of the 2010 Update was "particularly **relevant**."[4] *Clark*, 2013 WL 6729512 at *3 (emphasis added).

To the extent this Court finds any ambiguity in 38 U.S.C. § 7252(b), it should apply the veteran's canon and interpret the statute broadly in favor of veterans like Mr. Euzebio before deferring to the interpretation and resulting decision below. The veteran's canon requires that in interpreting a statute, the court should construe it in the veteran's favor. *See Henderson*, 562 U.S. at 441; *Gardner*, 513 U.S. at 118; *see also Boone v. Lightner*, 319 U.S. 561, 575 (1943). Scholars have advocated for federal courts to apply this canon as a traditional interpretation tool before looking at the applicability of *Auer* or *Chevron* deference. *See* Chadwick J. Harper, Note, *Give Veterans the*

[4] Holding that the Secretary's commenting in the Federal Register as the only way to meet the relevancy standard is too limiting. Many reasons may exist for whether the Secretary comments, or not, on a report or document commissioned for and submitted to VA. Such a requirement would cut against the first, specific inquiry of whether the document was "generated by VA or submitted to VA by the appellant[,]" which is still and always has been the requirement. *Monzingo*, 26 Vet.App. at 102.

Benefit of the Doubt: Chevron*,* Auer*, and the Veteran's Canon*, 42 Harv. J.L. & Pub. Pol'y, 711, 953–68 (2019) (arguing the veteran's canon addresses ongoing problems of proof in veterans law). The late Justice Scalia also noted the conflict between *Gardner*'s veteran's canon and *Chevron*. *Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, Veterans L.J. 1, 1 (Summer 2013), http://www.cavcbar.net/Summer%202013%20VLJ%20Web.pdf ("Justice Scalia explained that a nation can be judged by how well it treats its veterans."). The veteran's canon is critical where CAVC read beyond and added a new element to apply the statute, one that narrows rather than conforms with the statute's inherent wide coverage of relevant evidence. Thus, this Court should apply the veteran's canon as a stand-alone tool of statutory interpretation for 38 U.S.C. § 7252(b) to hold that *Monzingo*'s "direct relationship" requirement is impermissible.

A return to a relevancy standard will not trigger a barrage of medical nexus opinions resulting in awards of benefits to all those who walk through the doors of a VA Regional Office. Mr. Euzebio, like many other veterans, must still receive a medical examination or

opinion before VA can decide the claim. The actual scientific and statutory merits of his claim—like many others—still hang in the balance, and proper adjudication must wait for another day. But it will be made on a full and complete record, as it should.

In advocating for the "direct relationship" requirement, VA found a mechanism to avoid triggering the duty to assist before the veteran has the opportunity to establish the claim. That position is inconsistent with 38 U.S.C. § 5103A's scope and *McLendon*'s low threshold.[5]

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[5] Mr. Euzebio did not raise detailed constitutional arguments; however, the decision below raises significant due process concerns. Veterans have a constitutional property interest in nondiscretionary, statutorily mandated VA benefits. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). *See* Michael Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. Cin. L. Rev. 501, 512–13 (2012). As argued *passim*, the arbitrary, inequitable, and undefined requirement used below leads to inconsistent application and fundamentally unfair decisions. It also, in effect, inhibits a veteran's right to present evidence by granting the Board the "unfettered discretion" to ignore relevant evidence—contrary to statutory direction—whenever it deems that the evidence is not dispositive for the claim. *See Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969); *accord Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). A veteran is deprived of the constitutional right to proper adjudication when VA can deem evidence like the Update not *constructively* before it while *actually* possessing it *and* referring to it in a claim denial. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff*, 418 U.S. at

B. CAVC erred by deeming the 2014 Agent Orange Update irrelevant.

The bar is low for entitlement to a VA medical examination. 38 U.S.C. § 5103A(d)(2). The first, second, and fourth elements to determine the need for a VA medical exam are often simple to show and not in dispute. The third element—the indication that the current disability may be associated with an in-service event or other service-connected disability—is the crux inquiry. *McLendon*, 20 Vet.App at 83 (citing 38 U.S.C. § 5103A(d)(2)(B) & 38 C.F.R. § 3.159(c)(4)(i)(C)). However, *McLendon* made clear that only a "low threshold" is required and the evidence need only indicate "that there *may* be a nexus between the two." *Id.* (emphasis added) (internal citations omitted). Scholars have advocated for VA not only to operate consistent with this low evidentiary bar but also to provide a medical examination any time the disability "is as likely as not connected to military service." Pomerance & Eagle, *supra*, at 23–26 (stating it would preserve the

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558 (internal citation omitted); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). Requirements like the one here may violate the "constitutional right to have [the] claim for veteran's disability benefits decided according to **fundamentally fair procedures**." *Cushman*, 576 F.3d at 1299–1300, 1302 (emphasis added).

process "as an example of the VA's pro-claimant, non-adversarial mission to help veterans and their dependents receive the benefits that they earned"). Here, the type of evidence deemed not in the record highlights the problems with CAVC's reasoning, and the likelihood of continued, prejudicial benefits decisions.

The Agent Orange Act of 1991 required VA to contract with the Institute of Medicine ("IOM") of the NAS to conduct scientific research on the link between medical conditions and herbicide exposure of U.S. Vietnam veterans, and to identify carcinogenic hazards to human health. Pub L. 102-4, 105 Stat. 11 (1991). IOM published biennial reviews focusing on whether a statistical association exists between diseases and herbicide exposure, including NAS Agent Orange Updates from 1994–2014, and 2018 in accordance with the Agent Orange Act. VA's website makes the NAS Updates readily available. *Publications & Reports on Agent Orange*, U.S. Dep't of Veterans Affairs, https://www.publichealth.va.gov/exposures/agentorange/publications/index.asp (last visited Feb. 22, 2020).[6]

[6] VA's authority under the Agent Orange Act of 1991 to issue regulations for additional presumptions expired on September 30, 2015. While IOM is no longer statutorily required to issue reports to VA about

For each new Update after 1994, IOM researched relevant sources and citations from the literature cut-off date of the last report. In addition to independent research, NAS Update 2014 had information gathered from veterans and other interested people who testified at public hearings or offered written submissions. Health and Medicine Division, *Veterans and Agent Orange: Update 2014*, at 36, Nat. Acads. of Scis. Eng'g & Med. (2016), https://doi.org/10.17226/21845. After receiving a NAS Agent Orange Update, VA's general practice involved a three-tiered review (by a working group, a task force group, and the Secretary of the Department of Veterans Affairs) to decide whether to presumptively service-connect a condition. *See* Sidath Viranga Panangala & Daniel T. Shedd, Cong. Research Serv., R43790, *Veterans*

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the possible links between Agent Orange and medical conditions, Congress, nonetheless, enacted legislation requiring the "Health and Medicine Division" (HMD) to issue NAS Agent Orange Update 2018 to specifically focus on possible generational health effects that may be the result of herbicide exposure among male Vietnam veterans, myeloproliferative neoplasms, and glioblastoma. *See* Health and Medicine Division, *Veterans and Agent Orange: 11th Biennial Update*, Nat. Acads. of Scis. Eng'g & Med. (Nov. 15, 2018, 11:00 AM EDT), http://nationalacademies.org/hmd/Activities/Veterans/AgentOrangeEleventhUpdate.aspx.

Exposed to Agent Orange: Legislative History, Litigation, and Current Issues (2014) (citing 38 U.S.C. §§ 1116(b)(2), (c)(1)(A), (c)(2)).

The Secretary can prescribe regulations providing that a presumption of service connection is warranted when the Secretary determines that sound medical and scientific evidence warrants a finding of a positive association between herbicide exposure and a disease. 38 U.S.C. § 1116(b)(1). In analyzing the available evidence and deciding whether a positive association exists between a disease and herbicide exposure, 38 U.S.C. § 1116 directed the Secretary to establish service presumptions without regard to the projected costs or to the existence of independent risk factors. *VA Disability Compensation: Presumptive Disability Decision Making: Hearing Before the Committee on Veterans' Affairs, United States Senate*, 111th Cong. 16 (2010) (statement of Eric K. Shinseki, Sec'y, U.S. Dep't of Veterans Affairs, discussing the decision to presumptively service connect Parkinson's disease, ischemic heart disease, and b-cell leukemias).

The NAS Updates are just one source of evidence that falls under *McLendon*'s scope because the evidence need only *indicate* that the current disability *may* be associated with the prior service.

Furthermore, against the statutory backdrop, VA should *always* consider the Updates in adjudicating a claim. *McLendon* recognizes evidence is covered even when it only "suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits." 20 Vet.App. at 83. NAS Update 2014 meets *Mclendon*'s scope here, and in other veterans' benefits contexts.[7] VA's own manuals address how the Board should adjudicate herbicide claims. Board of Veterans' Appeals, *The Purplebook*, U.S. Dep't of Veterans Affairs, Version 1.0.2., 145–46 (Sept. 2018) (instructing Board to "not deny service connection for hypertension, bladder cancer, or hypothyroidism without first obtaining a VA medical opinion on the nexus element"). Acknowledging NAS Update 2014 and potential future publication in the Federal Register, the Purplebook further recommends the Board automatically remand cases without nexus opinions for hypothyroidism.[8] *Id.* at 146. Additionally, VA's M21-1 Adjudication Procedures Manual cites 38 U.S.C. § 1116 and NAS data in its section on service connection for disabilities resulting from exposure to environmental hazards or service

[7] *See infra* Sec. II.

[8] Mr. Euzebio seeks service-connection for this condition.

in Vietnam. *See* U.S. Dep't Veterans Affairs, M21-1 Adjudication Procedures Manual (M21-1) pt. IV, subpt. ii, ch. 2, § C (noting the Secretary has relied on "scientific data reported by NAS since 1993" to conclude "that a positive association does not exist between herbicide exposure and" a list of conditions).

But Mr. Euzebio, and countless other current and future veterans, will not be able to meet *McLendon*'s low bar because of the overly narrow reading of 38 U.S.C. § 7252(b) with the non-statutory "direct relationship" requirement. In short, the arbitrary *Monzingo* standard permits the Board to expedite denial of claims—once they have finally arrived at the Board after languishing for years[9]—at the expense of veterans and their right to VA assistance in developing their claims and to have them fully and fairly considered.

[9] The typical wait time is three to seven years. Ben Kesling, *Hundreds of Thousands of Veterans Appeals Dragged Out by Huge Backlog*, Wall St. J. (Sept. 19, 2018) (stating one in fourteen veterans die while waiting).

C. Adjudicatory contexts outside of VA do not support the "direct relationship" requirement.

"Direct relationship" is also an undefined, prejudicial requirement when analogized to other legal proceedings. For example, in the criminal system, a citizen's liberty stakes are at their highest, so the government bears the highest burden of proof before it can take that liberty away. Before the government can adjudicate a defendant guilty, the Due Process Clause requires the government to prove beyond a reasonable doubt every fact required to meet the elements of the charged crime. *In re Winship*, 397 U.S. 358, 364 (1970). Criminal liability can result from either actual or constructive possession. "Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object." *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015) (internal citation omitted) (noting that statute prohibiting convicted felons from possessing weapons includes not only actual physical possession but also having control over weapons in the possession of third parties); *see also United States v. Cartwright*, 359 F.3d 281, 290 (3rd Cir. 2004) (concluding that a "jury could have *reasonably inferred* that [the defendant] was in constructive possession

of heroin") (emphasis added)). Absent, however, is any language suggesting a "direct relationship" requirement. A court can permit a jury to make reasonable inferences as to control.

The law should not establish a higher bar in the veterans claims context to show constructive possession than the criminal context when liberty is at stake. Indeed, the VA setting is one in which Congress explicitly provided for benefits to recognize and repay our veterans for their service, on behalf of a grateful nation. The criminal setting, conversely, is one where the government can eliminate a private citizen's freedom for committing a crime, yet the veteran seeking benefits must prove more elements to show constructive possession than a prosecutor. Thus, the government can use a standard to its advantage to eliminate a person's liberty, but when the standard would turn back at it, the sword vanishes.

Social security claims adjudication is also instructive for veterans claims. While not uniquely pro-claimant like the VA scheme, social security proceedings are, similarly, non-adversarial in nature. *See Snead v. Barhardt*, 360 F.3d 834, 838 (8th Cir. 2004) (distinguishing the normal legal practice where "courts rely on the rigors of the

adversarial process to reveal the true facts of a case") (internal citation omitted). In social security hearings, the administrative law judge has a duty to develop the record, regardless of whether counsel represents the claimant. *Id.* The duty to "develop the record fairly and fully" is independent from the claimant's burden to present their case. *Id.* Unlike counsel, the hearing examiner "possesses no interest in denying benefits" and must neutrally develop the facts in the record. *Id.* (citing *Richardson v. Perales*, 402 U.S. 389, 410 (1971)). Unfair or prejudicial failure to develop the record mandates reversal. *Id.* In *Snead*, the Eight Circuit held that it was a prejudicial failure to develop the record where the administrative law judge did not include potentially dispositive evidence submitted by the claimant—a physician's report stating the claimant could not work—which could have changed the result of the disability determination on appeal. *Id.* at 839 (determining that the judge "should have taken steps to develop the record sufficiently to determine whether the [claimant's evidence] deserved controlling weight" and because of the potentially dispositive evidence, the decision below was unreliable).

The "direct relationship" requirement in the VA context hamstrings claimants, *pro se* or otherwise, because it is inconsistent with the scope of the duty to assist. Like the social security adjudicatory system, which is non-adversarial in developing the facts, the VA system adds another preference, one that is uniquely pro-claimant. But the social security system does not have such a narrowing evidentiary requirement. Rather, it imposes a duty on the hearing examiner to "fairly and fully develop the record" to discover any potentially relevant and dispositive evidence. Conversely, the "direct relationship" requirement adopted by CAVC only increases the frequency of precluding evidence that may affect the outcome of a claim. Not only would this requirement be unworkable in the social security context, it is even more prejudicial and misguided in the VA claims system, a system which uniquely favors veterans.

This Court recognized the social security context is different in "purpose and procedure," and thus the veterans' system in practice demands more. *See Hodge*, 155 F.3d at 1362–63 (stating that "the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic

fairness and the appearance of fairness carries great weight"). Insofar as other adjudicatory bodies address constructive possession, CAVC is the only forum that applies a "direct relationship" requirement to the concept of constructive possession to the extent analyzed here. While CAVC has articulated this requirement under the guise of rationality, its practical effect and incompatibility with veterans law as congressionally mandated—and the policies underlying the law—demand that this cloak be removed.

II. VA'S INCONSISTENT USE OF SCIENTIFIC EVIDENCE, WHICH IS ENCOURAGED BY THE UNDEFINED "DIRECT RELATIONSHIP" REQUIREMENT, HARMS VETERANS.

The "direct relationship" requirement allows VA to *sua sponte* rely on scientific evidence as relevant and material in denying a veteran's claim while ignoring the same evidence as irrelevant when it might help a veteran's claim. Below, NLSVCC clinics and attorneys offer several examples that show VA challenging the NAS Updates on Agent Orange ("AO") as insufficient when it may support the Veteran, but relying on the NAS Updates as relevant and material when the Updates support denial.[10]

[10] Client and clinician consents on file with the brief's authors.

For Vietnam Veteran, F.C., who served "boots on the ground" in the country of Vietnam, the VA Regional Office questioned a VA examiner's use of the NAS Update to conclude the Veteran's bladder cancer was at least as likely as not "related to AO exposure" rather than the Veteran's tobacco use, which he had ceased forty years ago. The examiner reasoned the NAS Update showed the condition would soon be included on the list of conditions presumptively related to AO exposure. The Regional Office, however, asked the examiner for "clarification,"[11] instructing the examiner to "determine if the bladder cancer is 'directly related' to" herbicide exposure. The examiner responded that if direct relationship was the requirement, "none of the presumptives for AO would fall into this category." Nevertheless, she reversed her conclusion to say his condition was "less likely than not" directly related to AO.

While VA rejected the NAS Update when it would have helped F.C.'s claim, VA used the NAS Update to deny a claim filed by M.M., spouse of a deceased Vietnam Veteran. M.M. filed a Dependency and

[11] The RO's use of "clarification" appears to several attorneys regularly practicing in this area to be an implicit instruction to an examiner to reverse conclusions supporting service connection.

Indemnity Compensation Claim ("DIC claim") related to her husband's death from urothelial cell carcinoma, a disease not on the list of conditions presumptively related to AO exposure. M.M. submitted a nexus letter from the treating oncologist connecting the disease to AO exposure, but the VA Regional Office ultimately denied the claim because the medical opinion did not refute NAS Update 2014, which found insufficient evidence to connect the Veteran's condition with exposure to AO. Another spouse with a DIC claim, A.P., is waiting for a Board decision because VA relied on the Agent Orange Act of 1991, and so implicitly the NAS Update, to find the Veteran's condition was not on a list of conditions presumptively related to AO exposure.

Allowing VA to ignore evidence supportive of veterans' claims and simultaneously use the same evidence as a sword to deny veterans' claims becomes even more absurd in light of VA's role in generating that evidence. CAVC acknowledged that the NAS Update 2014 was created for a VA purpose, through a congressional mandate. *Euzebio*, 31 Vet.App. at 399. In fact, the government often commissions research through Congress. *See* Agency for Toxic Substances and Disease Registry, U.S. Dep't of Health & Human Servs.,

https://www.atsdr.cdc.gov/ (last updated Feb. 11, 2020) (report of drinking water contaminants at Camp Lejeune and resulting cancers and other diseases found at https://ntp.niehs.nih.gov/whoweare/organization/index.html). *See also* Office of the Assistant Secretary for Planning and Evaluation, *Poverty Guidelines*, U.S. Dep't of Health & Human Servs. (updating the federal poverty limit annually, reporting at https://aspe.hhs.gov/poverty-guidelines (last visited Feb. 24, 2019)). This research costs the government significant amounts of money,[12] so in some instances, the government is unsurprisingly charged with using the resulting report. *See id.* (mandating that the federal poverty limit be used to determine federal eligibility for Head Start, SNAP benefits, the National School Lunch Program, and other programs). Here, CAVC's decision allows VA to ignore a report federally commissioned to inform the very category of claims in which Mr. Euzebio's claim fell, but rely on that

[12] For FY 2021, VA requested $787 million in appropriations. FY 2021 Budget Submission, *Volume II, Medical Programs and Information Technology Programs*, at 433, https://www.va.gov/budget/docs/summary/fy2021VAbudgetVolumeIImedicalProgramsAndInformationTechnology.pdf (last visited Feb. 24, 2020). Appropriations are in part used by the Office of Research and Development ("ORD") to fund research and reports. *Id.*

report to deny other similarly-situated veterans' claims. That result cuts against congressional intent. 146 Cong. Rec. S9213 (daily ed. Sept. 25, 2000); H.R. Rep. No. 963, 100th Cong. (1988).

This is "developing to deny" writ large. Yes, VA must "protect[] the interests of the Government," but VA must also "assist a claimant in developing the facts pertinent to the claim and . . . render a decision which grants every benefit that can be supported in law." 38 C.F.R. § 3.103(a). Yes, VA has authority to "collect and develop evidence that might rebut the presumption of service connection[,]" *Douglas v. Shinseki*, 23 Vet. App. 19, 24 (2009), but "collecting and developing" is not the same as *ignoring* relevant evidence.

This is not a case where the plain reading of the statute would lead to an absurd result, which may warrant an additional judge-made standard. Instead, the judicially-crafted "direct relationship" requirement itself leads to an absurd result, as Judge Allen pointed out in his dissent below, which highlighted the logical fallacies within the majority opinion. *Euzebio*, 31 Vet.App. at 407–12 (Allen, J., dissenting) (concluding NAS Update 2014 "was before the Board one way or another" and Board "should have considered whether the

Update provided the necessary foundation to trigger the need for a [*McLendon*] nexus examination"). Without even going to the question of constructive possession, CAVC could not logically determine that the Board lacked actual knowledge of the NAS Updates when the Board referenced them in its decision. The Board only referenced it *because of* its relevance.

To require anything more than a relevancy standard erodes the scope of the duty to assist, contradicts 38 U.S.C. § 5103A, and encourages inconsistent, prejudicial decisionmaking in an already complex, dilatory claims adjudication system. With respect to Mr. Euzebio's claim, it defies logic to determine that the Update—*which the Board referenced in its decision*—is not before the Board actually or constructively. VA's duty to assist should, at a minimum, prohibit ignoring evidence that VA knows about and is relevant to the type of claim at issue.

III. RETURNING TO THE STANDARD OF RELEVANCE WILL NOT UNDULY BURDEN VA.

Eliminating the "direct relationship" requirement will not overwhelm VA Regional Offices. Technology readily can and has addressed old, unfounded slippery slope concerns. Agencies are

digitalizing records. A person can conduct a public search to find a word or topic in an article, just as a potential homebuyer can ask the county clerk and recorder to provide recorded documents for the property. Against the backdrop of the duty to assist and the low threshold necessary to trigger a medical examination, VA's purview should extend to this type of investigation.

Eliminating the "direct relationship" requirement is even more appropriate when the agency itself possesses the necessary, relevant evidence. Recognizing that the list of presumptive conditions could grow based on scientific and evidentiary development, Congress still commissioned the NAS Updates. Importantly, "[n]ot all evidence is the same." *Euzebio*, 31 Vet.App. at 411–12 (Allen, J., dissenting) (also suggesting any earlier, legitimate concerns over difficulty in obtaining information "buried in some files . . . must be reconsidered in light of the so-called information age"). As mentioned above, the NAS Updates are readily available on-line. *Publications & Reports on Agent Orange*, U.S. Dep't of Veterans Affairs, https://www.publichealth.va.gov/exposures/agentorange/publications/index.asp (last visited Feb. 22, 2020).

Common sense and technology both put constraints on what evidence VA must consider in adjudicating a claim to effectively perform its duties. The existence of internal guidance like the M21-1 and the Purplebook is telling. *See Euzebio*, 31 Vet.App. at 411 (Allen, J., dissenting) ("[T]he Board has the procedures necessary to ensure that NAS Updates are considered in appropriate benefits claims."). The Purplebook encompasses a comprehensive list of Board guidance—from pre-decisional development and case drafting to best practices, including remands and denials for herbicide agent claims. Board of Veterans' Appeals, *The Purplebook*, U.S. Dep't of Veterans Affairs, Version 1.0.2. (Sept. 2018).[13] Not only as one way of evidencing the Board's knowledge of the NAS Updates, VA's own materials like the Purplebook also demonstrate the agency's understanding of the evidentiary relevancy of these third-party materials. *Euzebio*, 31

[13] In its best practices section, the Purplebook instructs: "*All* competent and credible lay evidence must be explicitly weighed in the decision unless there is a specific finding that the evidence is *not relevant* to the appeal." *Id.* at 144 (emphasis added). Thus, VA's own guidelines instruct the Board to make a relevancy determination. The words "direct relationship" are found nowhere in the Purplebook.

Vet.App. at 411 (Allen, J., dissenting). VA established corresponding procedures for this very evidence. *Id.*

Reversing the lower court would not guarantee benefits to all claimants. Nor would it "eliminate the carefully drafted statutory standards governing the provision of medical examinations and require the Secretary to provide such examinations as a matter of course in virtually every veteran's disability case." *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010). Rather, upon a showing of relevance, a reversal of CAVC's judgment keeps the process moving for veterans before VA can short-circuit it. The government has the resources. The average claimant does not; that is why they seek the government's help in the first place. Congress has spoken on what it expects from VA.

Finding that evidence is relevant and constructively before VA when it is within VA's control and would reasonably be expected as part of the record would not unduly burden VA; rather, it acts to ensure the agency satisfies its statutory duties, consistent with the non-adversarial, pro-claimant system. Reversal of the "direct relationship" legal fiction will eliminate inequitable results for veterans, prevent

absurdity, and force consistent decisionmaking by VA, in accordance with the congressional will expressed in veterans' benefits law.

CONCLUSION

The decision of the Court of Appeals for Veterans Claims should be reversed.

Respectfully submitted,

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Dated: February 28, 2020

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