No. 20-1072

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 a Judgment
of the United States Court of Appeals for Veterans Claims
in No. 17-2879

BRIEF OF APPELLANT ROBERT M. EUZEBIO

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

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Euzebio **v.** Wilkie

Case No. 2020-1072

CERTIFICATE OF INTEREST

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

Robert M. Euzebio

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
Robert M. Euzebio	Robert M. Euzebio	N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:
Maura Jean Clancy, Megan M. Ellis, Linden K. Nash, Emma L. Peterson

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

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

None

2/21/2020
Date

/s/ Zachary M. Stolz
Signature of counsel

Please Note: All questions must be answered

Zachary M. Stolz
Printed name of counsel

cc: all counsel via CM/ECF

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Statement of Related Cases

Pursuant to Fed. Cir. R. 47.5, the undersigned counsel states that no other appeal has been taken in this case in or from the United States Court of Appeals for Veterans Claims, before this Court, or any other appellate court.

Counsel further states that he is unaware of any cases pending before this Court that are related to this challenge or may be affected by the Court's decision.

/s/ Zachary M. Stolz
Zachary M. Stolz

Statement of Subject-Matter and Appellate Jurisdiction

On August 22, 2019, the United States Court of Appeals for Veterans Claims affirmed the July 2017 Board of Veterans' Appeals decision denying the Veteran entitlement to service connection for a thyroid condition as related to his exposure to herbicide agents. On September 13, 2019, the Veterans Court entered judgment on its decision. On September 19, 2019, Mr. Euzebio timely appealed the judgment to this Court. This Court has jurisdiction pursuant to 38 U.S.C. § 7292(a). The issues on appeal are entirely issues of law. The order appealed from is final.

Statement of the Issues

The Veterans Court's "direct relationship" requirement is an erroneous legal standard for determining what facts are before the Board because it excludes relevant matters that are known or should be known to the Board. Additionally, the Veterans Court erred in holding that it lacks the legal authority to look at relevant facts known to the agency for purposes of reviewing the Board's decision. Finally, the Veterans Court misinterpreted the scope of VA's duty to assist when it affirmed VA's failure to develop the record with relevant facts concededly known to the agency.

Statement of the Case

A. Nature of the Case

This case raises the question of whether the Board's undisputed knowledge of relevant evidence—here, *Veterans and Agent Orange: Update 2014*—requires, as a matter of law, that the evidence be deemed to have been before the Board in an adjudication. It therefore involves the proper interpretation of what is before the Secretary and the Board, the extent of the Veterans Court's legal authority to look beyond the record before the agency for purposes of reviewing the Board's decision, and the scope of VA's duty to assist.

B. Statement of Facts, Course of Proceedings, and Disposition Below

Mr. Robert Euzebio performed two tours of duty in the Republic of Vietnam during his honorable service in the United States Navy from 1965 to 1969. Appx31; Appx51. Many years later, around 2009, he began having trouble swallowing. Appx58. Testing revealed that nodules had developed on his thyroid, a condition for which he had no known risk factors, such as a family history. Appx32-39; Appx57-59. He requested service-connected disability compensation for "thyroid nodules believed caused by my exposure to Agent Orange while serving in Vietnam," explaining, "I believe my exposure to these toxins . . . caused my health issues." Appx40; Appx53. He also told one of his doctors that he felt his thyroid condition

was related to his herbicide exposure, but the doctor—a urologist who was treating him for a prostate condition—did not comment on his theory. Appx42.

VA denied Mr. Euzebio's claim, finding that "available scientific and medical evidence does not support the conclusion that the condition is associated with herbicide exposure." Appx43-49. He appealed to the Board of Veterans' Appeals, explaining his continued belief that his "problems were caused by Agent Orange" because he had "no family history of thyroid problems." Appx50-52; Appx54; Appx57; Appx59.

Meanwhile, the Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides within the Health and Medicine Division of the National Academies of Sciences, Engineering, and Medicine published the 2014 *Update*. Appx70 (citing Health and Medicine Division, *Veterans and Agent Orange: Update 2014*, *available at* http://www.nationalacademies.org/hmd/Reports/2016/Veterans-and-Agent-Orange-Update-2014.aspx (last visited Feb. 20, 2020)); Appx76. The Committee determined that there is "limited or suggestive evidence of an association" between hypothyroidism and Agent Orange. Appx70. In one study considered by the committee, "[t]hyroid conditions overall . . . showed an indication of increased risk with herbicide exposure." Appx72. The Committee also noted "consistent observations of exposures to [herbicide agents] being related to perturbations of thyroid function." Appx72.

In its adjudication of Mr. Euzebio's claim, the Board recognized that the Secretary must consider "reports of the National Academy of Sciences (NAS)" when deciding whether to presume that a condition is a health effect of exposure to herbicide agents. Appx66. And before the Veterans Court, the Secretary conceded that VA generally knew of the existence of the *Update* when the Board made its decision. Appx8 (citing Oral Argument at 28:18-25). But the Board did not discuss whether the reports contained any information relevant to Mr. Euzebio's claim. Appx60-69. Rather, in denying his claim, the Board found that he had not met "even the low burden triggering VA's duty to assist in providing an examination and medical opinion." Appx64; Appx68. The Board decided that only his "conclusory generalized statements" spoke to whether there might be an association between his disability and his herbicide exposure. Appx64; Appx68.

Despite the Board's reference to the *Update* and the Secretary's concession, the Veterans Court held that the 2014 *Update* nevertheless was "not constructively part of the record before the Board" for purposes of judicial review of the Board's decision under 38 U.S.C. § 7252(b). Appx9. The Veterans Court traced the evolution of its constructive possession doctrine, under which "documents that are not actually in the record before the Board may be deemed constructively before the Board." Appx6. At the doctrine's inception, a document was constructively before the Board if it (1) was "within the Secretary's control" and (2) "could reasonably be expected to be a part of the record." Appx6. But the "reasonable expectation element" subsequently

"narrowed . . . to include a relationship requirement—the document cannot be 'too tenuous[ly]' related to the claim before the Board." Appx6. In the doctrine's current form, the Court concluded, that element requires "a direct relationship between the document and [the] claim . . . even if the document was generated for and received by VA under a statutory mandate." Appx7-8.

Applying the current test, the Court held that, even though it was "undisputed that VA generally knew of the existence of the 2014 *Update* at the time of the decision on appeal," the *Update* was not constructively part of the record. Appx8. The Court determined that the reasonable expectation element was not met because the "general information about the type of disability on appeal" in the *Update* did not give it a "direct relationship" to Mr. Euzebio's claim. Appx8. Because the *Update* was not "specific to" Mr. Euzebio, the Court reasoned, its connection to his appeal was "too tenuous to reasonably expect [it] to be before the Board." Appx10.

Accordingly, the Court found no error in the Board's failing to use the *Update*, and it would not itself use the *Update* to review the Board's findings that there was no evidence indicating that Mr. Euzebio's disability might be related to his herbicide exposure and thus that he was unentitled to a VA medical nexus opinion. Appx11-15. With the record of proceedings thus limited, the Court held that, because the Veteran's own belief in an association was the only evidence of a connection between his disability and his herbicide exposure in the record, any Board error in deciding that he was unentitled to a VA medical opinion was harmless under *Waters v. Shinseki*, 601

F.3d 1274, 1277 (Fed. Cir. 2010). Appx14-15. Mr. Euzebio timely appealed from the Veterans Court's judgment. Appx22; Appx23.

Summary of the Argument

The Veterans Court held that the *Update* was not before the Board because the "general information about the type of disability on appeal" in the *Update* did not give it a "direct relationship" to Mr. Euzebio's appeal. However, the "direct relationship" requirement is an erroneous standard for determining what is before the Board. The agency cannot feign ignorance of relevant evidence of which it is aware. The "direct relationship" requirement permits it do to so. Yet judicial review exists to ensure that VA fulfills its duty to develop the record. And, throughout the statutory scheme for VA claims adjudication, relevance is the standard that defines the scope of that duty.

Here, it is undisputed that the Board knew about the *Update* when it decided Mr. Euzebio's claim. Furthermore, the *Update* was relevant to his claim. The Board's feigned ignorance of that relevant evidence rendered its decision arbitrary and capricious. The Veterans Court's erroneous "direct relationship" standard led it to affirm that arbitrary and capricious decision.

Because the Board unquestionably knew about the *Update* when it made its decision, and the *Update* was relevant to Mr. Euzebio's claim, it was constructively before the Board. Accordingly, this Court should hold that when the Board is on actual notice of relevant evidence, it must consider it, and that relevant evidence is not

limited to evidence specific to the claimant. Alternatively, it should hold that developing the record with relevant evidence known to VA is within the scope of the duty to assist, and that the Veterans Court has authority to review the agency's failure to do so.

Argument

A. Jurisdiction and Standard of Review

This Court decides all relevant questions of law. 38 U.S.C. § 7292(d)(1). This Court has jurisdiction to review all legal questions decided by the Veterans Court. *Szemraj v. Principi*, 357 F.3d 1370, 1374-75 (Fed. Cir. 2004). Review of claims of legal error in a decision of the Veterans Court is without deference. *Id.* at 1372. This Court also has jurisdiction to review any rule of law relied on by the Veterans Court in making its decision. *Morgan v. Principi*, 327 F.3d 1357, 1363 (Fed. Cir. 2003). The scope of VA's duty to assist is a legal issue that this Court has jurisdiction to decide. *See Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed. Cir. 2013). Where the material facts are not in dispute and the adoption of a particular legal standard would dictate the outcome of a veteran's claim, this Court treats the application of law to undisputed fact as a question of law. *See Groves v. Peake*, 524 F.3d 1306, 1310 (Fed. Cir. 2008).

B. The Veterans Court relied on an erroneous legal standard when it refused to consider the 2014 *Update* because it lacked a "direct relationship" to Mr. Euzebio's claim

1. The Veterans Court misinterpreted the law governing the scope of material before the Board when it excluded relevant facts of which the Board had actual notice

When VA adjudicates a claim, "statutes and regulations require consideration of 'the entire evidence of record,' 38 C.F.R. [§] 3.303(a), including 'all pertinent medical and lay evidence,' *id.*, and 'all procurable and assembled data,' 38 C.F.R. [§] 3.102." *Fagan v. Shinseki*, 573 F.3d 1282, 1287 (Fed. Cir. 2009) (citing 38 U.S.C. § 5107(b)). The "statutory command" in 38 U.S.C. § 5107(b) to "consider all information and lay and medical evidence of record" "is directed at ensuring consideration of all *relevant* evidence, such that the VA resolves close cases in favor of the veteran." *Veterans Justice Grp., L.L.C. v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1356 (Fed. Cir. 2016) (emphasis in original). Accordingly, this Court has "repeatedly emphasized that all pertinent evidence must be considered." *Fagan*, 573 F.3d at 1287.

Similarly, 38 U.S.C. § 7104(a) provides that the Board's decision "shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record." The statute does not on its face prohibit the Board from considering facts outside the record. On the contrary, Congress expressly considered and rejected such a prohibition, deciding that, "although the decision must be based on the entire record . . . it need not be based exclusively on material in the record, thereby affording opportunity for the Board to take notice (as courts are able to take

judicial notice) of matters not on the record." *The Proposed Veterans' Administration Adjudication Procedure and Judicial Review and Veterans' Judicial Review Acts, Hearing on S. 11 and S. 2292 Before the S. Comm. on Veterans' Affairs*, 100th Cong. 741 (1988).

The contents of the *Update* are precisely the type of information that is appropriately the subject of such notice. The doctrine of official notice, to which Congress alluded, "is broader than judicial notice insofar as it also allows an administrative agency to take notice of technical or scientific facts that are within the agency's area of expertise" *Sykes v. Apfel*, 228 F.3d 259, 272 (3d Cir. 2000); *see also* 5 U.S.C. § 556(e) (providing that an agency decision may "rest[] on official notice of a material fact not appearing in the evidence in the record"); *Yeoman v. West*, 140 F.3d 1443, 1448 (Fed. Cir. 1998) (discussing potential applicability of § 556(e) to a Board adjudication).

Moreover, the Board, as an administrative tribunal, "learns from its cases." *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026-27 (9th Cir. 1992). "A case before an administrative agency, unlike one before a court, 'is rarely an isolated phenomenon, but is rather merely one unit in a mass of related cases . . . [which] often involve fact questions which have frequently been explored by the same tribunal.'" *Id.* at 1026 (quoting Walter Gelhorn, *Official Notice in Administrative Adjudication*, 20 Tex. L. Rev. 131, 136 (1941)). The Board has "frequently . . . explored" the health effects of herbicide exposure and has acquired knowledge of pertinent facts in doing so. *Id.* In its internal procedural manual, the Board explicitly states that VA is on notice of the

information in the *Update*, and the Secretary conceded as much before the Veterans Court. Appx8; Appx20 (Allen, J., dissenting); Appx76. Therefore, the contents of the *Update* are no secret to the Board but instead "obvious and notorious" facts that are appropriately subject to official notice when it decides a case. *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1202-03 (D.C. Cir. 1989).

In some cases, such as this, the facts at issue are so obvious and notorious to the Board that it is *obligated* to take official notice of them. The Ninth Circuit has adopted this approach to Social Security Administration adjudications. *See Banks v. Schweiker*, 654 F.2d 637, 640 (9th Cir. 1981) (citing 42 U.S.C. § 1383(c)(1) (1981)). SSA's claims adjudication system involves "a huge volume of cases and the ALJ has the affirmative duty in such cases for developing the facts fairly." *Id.* at 640-41. Considering those features of the SSA system, the Ninth Circuit held that "the ALJ should take notice of adjudicative facts, whenever, 'the ALJ at the hearing knows of information that will be useful in making the decision.'" *Id.* at 641 (citing 3 K. Davis, *Administrative Law Treatise* § 15:18, at 200 (2d ed. 1980)). Like the SSA, VA handles a huge volume of claims, through which it frequently explores the same issues and acquires knowledge of facts pertinent to those issues, and has an affirmative duty to develop facts. *See Claims Inventory*, Veterans Benefits Administration Reports (last updated Feb. 18, 2020), https://www.benefits.va.gov/reports/mmwr_va_claims_inventory.asp; 38 U.S.C.

§ 5103A. Consequently, when deciding a case, it must bring to bear those facts that have become obvious and notorious through its repeated experience.

By allowing the Board to pretend the *Update* does not exist when assessing whether there is an indication that Mr. Euzebio's thyroid condition may be related to his exposure to herbicides, the Veterans Court misinterpreted these provisions. The terms "all evidence and material of record" necessarily includes relevant and credible facts known to the Board, meaning the Board must consider them. 38 U.S.C. § 7104(a). "[T]he Court 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) (internal quotation marks omitted). Here, the Board concededly knew of the *Update*, and it cannot selectively profess to be unaware of it in a given adjudication. *See* Appx17 (Allen, J., dissenting).

Permitting the Board to render a decision that is at odds with facts known to it allows for arbitrary and capricious decision-making. A Board determination is arbitrary and capricious if the Board "'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the [Board], or is so implausible that it could not be ascribed to a difference in view or the product of [the Board's] expertise.'" *Elkins v. West*, 12 Vet.App. 209, 217 (1999) (en banc) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42-43, 103 S. Ct. 2856, 77 L. Ed. 2d 443

(1983)). Additionally, although "the law does not demand perfect consistency in administrative decisionmaking," still, "patently inconsistent applications of agency standards to similar situations are by definition arbitrary." *S. Shore Hosp. Inc. v. Thompson*, 308 F.3d 91, 103 (1st Cir. 2002). If a Board adjudicator is permitted to ignore at will relevant, credible facts he or she knows, then the administrative record depends on the whim of the individual decision-maker. As the dissent noted, permitting the Board to ignore the *Update* it admittedly knows exists is "a bizarre result," one that "can't possibly be the outcome of a rational system of adjudication, especially one designed to be pro-veteran and nonadversarial," and results in an outcome that "is impossible to justify." Appx17 (Allen, J., dissenting).

The Board cannot ignore an issue or argument that arises from a sympathetic reading of the record. *Robinson v. Mansfield*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). Likewise, when the Board knows about relevant evidence, its members cannot pretend otherwise when they decide claims. To do so would be inconsistent with Congress's intent "to maintain a beneficial non-adversarial system of veterans benefits . . . in which Congress expects [VA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (emphasis omitted) (quoting H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95).

This obligation does not impute omniscience to the Board. Just as its obligation to consider issues and arguments "reasonably raised" does not require it to engage in an "unguided safari," *Sellers v. Wilkie*, 30 Vet.App. 157, 164 (2018), it need not consider material of which it has no reason to be aware. It must nonetheless consider "all procurable and assembled data." *Fagan*, 573 F.3d at 1287 (quoting 38 C.F.R. § 3.102). In this case, in any event, it did not have to "divine that a certain document had been created" or search the bowels of VA to unearth it. Appx19 (Allen, J., dissenting). Rather, "[i]t is undisputed that the Board *actually knows* the Updates exist and that it knows what they are meant to do—provide scientific information about connections between Agent Orange exposure and certain medical conditions." Appx19 (Allen, J., dissenting); *see also* "Health and Medicine Division Reports on Agent Orange," https://www.publichealth.va.gov/exposures/agentorange/publications/health-and-medicine-division.asp (last visited Feb. 20, 2020) ("VA contracts with the Health and Medicine Division (HMD) (formally known as the Institute of Medicine) of the National Academy of Sciences, Engineering, and Medicine, a non-governmental organization, to scientifically review evidence on the long-term health effects of Agent Orange and other herbicides on Vietnam Veterans."). In the *Purplebook*, the Board even has an internal procedure for considering the *Update* when adjudicating claims based on herbicide exposure. Appx20 (Allen, J., dissenting); Appx76.

The absence of explicit "language in [38 U.S.C. §] 1116 suggesting that Congress intended for VA to consider the reports in adjudicating individual claims" is not a license to VA to ignore known, relevant facts in the *Update*, as the Veterans Court suggested. Appx9. In any case, the history of the *Updates* casts doubt on the Veterans Court's assumption that they were not intended to be used in individual claims. The *Updates'* predecessors were "evaluations of scientific or medical studies relating to the adverse health effects of exposure to 2,3,7,8 tetrachlorodibenzo-p-dioxin," to be conducted by the agency and periodically reported in the Federal Register. Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed. Reg. 34,452, 34,458 (Aug. 26, 1985) (formerly codified at 38 C.F.R. § 1.17). As mandated by Congress, these evaluations were to be given "due consideration" "[i]n the adjudication of individual claims." 50 Fed. Reg. at 34,459 (formerly codified at 38 C.F.R. § 3.311a(f)); *see* Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. 98-542, 98 Stat. 2725, § 5(b)(1)(C) (Oct. 24, 1984).

Although this requirement went away, it was not the result of apparent intent to make the *Updates* irrelevant to individual claims. Instead, following the decision in *Nehmer vs. U.S. Veterans' Admin.*, the agency's overhaul of its study evaluation criteria, and extensive discussion of VA's inefficacy in studying and compensating veterans for the health effects of herbicide exposure, Congress outsourced evaluation of medical studies to the NAS. *See*, *e.g.*, Agent Orange Act of 1991, Pub. L. 102-4, 105 Stat 11 (Feb. 6, 1991) (portions codified at 38 U.S.C. § 1116); *Nehmer v. U.S. Veterans Admin.*,

712 F. Supp. 1404 (N.D. Cal. 1989); *see also* Evaluation of Studies Relating to Health Effects of Dioxin and Radiation Exposure, 54 Fed. Reg. 40,388 (Oct. 2, 1989).

After the NAS took over evaluating studies of herbicide exposure's health effects, the Secretary eventually removed all references to the agency's evaluations of such studies from his regulations. *See* Removal of Obsolete References to Herbicides Containing Dioxin, 74 Fed. Reg. 17,857 (Apr. 8, 2010). Although this included removing the requirement that the evaluations be considered in individual adjudications, it was on the ground that 38 C.F.R. § 3.311a had been superseded by regulations implementing the Agent Orange Act of 1991. *Id.* at 17,858. Notably, the agency is still required to consider studies of the health effects of radiation exposure in individual claims. *See* 38 C.F.R. §§ 1.17, 3.311(f) (2019). The only apparent reason why this duty does not still exist in herbicide exposure claims, too, is the agency's recognized inadequacy in evaluating the pertinent studies in the first instance. *See* Agent Orange Act of 1991, Pub. L. 102-4.

Considering the foregoing history, the Veterans Court assumed too hastily that what Congress did not say in § 1116 was indicative of whether the *Updates* are relevant to individual claims. *See* Appx9-10. Congress deemed consideration of the *Updates'* predecessors mandatory in individual claims. Pub. L. 98-542, 98 Stat. 2725, § 5(b)(1)(C). When it reassigned responsibility for evaluating the health effects of herbicide exposure, it did not expressly disavow its prior mandate. *See* Pub. L. 102-4, 105 Stat 11.

The Board must consider all relevant material about which it knows. Therefore, it could not feign ignorance of the *Update*, which unquestionably was relevant to Mr. Euzebio's claim. In allowing it to do so, the Veterans Court misinterpreted the scope of material that is before the Board.

2. *The Veterans Court misinterpreted 38 U.S.C. § 7252(b) to require that evidence be directly related to the claim, precluding it from reviewing the Board's failure to consider relevant evidence within its ken*

Despite acknowledging that the Board knew about the *Update*, Appx8, the Veterans Court allowed the Board to feign ignorance of the *Update* with impunity because the *Update* was not "specific to" Mr. Euzebio but instead only "contain[ed] general information about the type of disability on appeal" and therefore did not bear a "direct relationship" to his claim. Appx8; Appx10. The Veterans Court announced and relied on an erroneous legal rule when it required evidence to have a "direct relationship" to the claim before it can review the Board's failure to address it. Appx8.

The "direct relationship" standard turns the concept of judicial review on its head, giving the agency the power to dictate what is—or is not—reviewable by the Veterans Court by turning a blind eye to relevant facts it knows. However, "in creating judicial review in the veterans context, Congress intended to preserve [the] historic, pro-claimant system" of adjudicating veterans' claims, *Hodge*, 155 F.3d at 1363, in which "[t]he government's interest . . . is not that it shall win, but rather that

justice shall be done," *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (quoting *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006)). "[I]t was for the purpose of ensuring that veterans were treated fairly by the government and to see that all veterans entitled to benefits received them that Congress provided for judicial review . . . ." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). The "direct relationship" standard thwarts this purpose.

In *Hodge*, this Court rejected the Veterans Court's standard for materiality in 38 C.F.R. § 3.156(a) as too stringent because it focused on whether new evidence was outcome determinative. *Hodge*, 155 F.3d at 1363. The *Hodge* Court reasoned that, "in 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." *Id.* To that end, it emphasized that "the ability of the Board to render a fair, or apparently fair, decision may depend on the veteran's ability to ensure the Board has all potentially relevant evidence before it." *Id.* And "evidence may well contribute to a more complete picture of the circumstances surrounding the origin of a veteran's injury or disability, even where it will not eventually convince the Board to alter its ratings decision." *Id.*

Similarly, in *McGee*, this Court held that a statute need not "require a specific legal result, such as the imposition of an obligation on the Secretary," to be applicable to a claim. *McGee*, 511 F.3d at 1356. Instead, "a provision of law is applicable to the Board's decision if its terms have some practical relevance to that decision." *Id.*

Therefore, this Court held that 10 U.S.C. § 1218 was relevant to a veteran's claim even though it was outside title 38 because it indicates that a service personnel file may show whether a veteran filed a claim for benefits prior to discharge. *Id.* at 1358.

Like the outcome-determinative standards this Court rejected in *Hodge* and *McGee*, the "direct relationship" requirement undermines the systemic and perceived fairness of VA's pro-claimant system. The Veterans Court reasoned that requiring the Board to bring known, relevant facts to bear on a claim "would undermine the Court's jurisdictional obligation." Appx9. On the contrary, it is the "direct relationship" requirement itself that does so. If "[a] congressionally mandated report[] submitted to VA" is relevant, then the Secretary is not free to ignore it, regardless of whether it was created "in connection with its nationwide system for administering disability benefits." Appx9. And the Veterans Court's job is to ensure that it does so. *See Hodge*, 155 F.3d at 1363.

The Veterans Court reasoned that "nothing in our decision limits what evidence *the Board* may *sua sponte* take into account in deciding appeals." Appx11 n.8. But in professing not to *limit* what the Board considers, the Court missed the point, overlooking that it is responsible to ensure that that the Board *does* consider all relevant, known facts. *See Fagan*, 573 F.3d at 1287; *Hodge*, 155 F.3d at 1363. A system in which the Board can decide to consider or ignore relevant evidence at will is a system in which the agency can—or at least apparently can—avoid its statutory duties with impunity. *See Hodge*, 155 F.3d at 1363; Appx11 n.8.

The Veterans Court also invoked a concern about creating an expectation that a report "would be part of the record before the Board in every . . . claim" for the disability the report addressed. *Monzingo*, 26 Vet.App. at 103; Appx9 (quoting *Monzingo*). Here, too, the Court's reasoning is backwards. The Court's role is to ensure that the report is addressed if it is known to the Board and contains relevant facts, not to immunize the Board from responsibility for failing to consider it.

As this Court has noted, the Veterans Court's own rules of procedure use a relevance standard to determine what evidence that court must look at when reviewing agency action. *Barrett*, 466 F.3d at 1043. These rules pertain to the "record before the agency" and the "record of proceedings" before the Court. U.S. Vet. App. R. 10, 28.1. The record before the agency is not limited to materials that were physically in the "claims file" when the Board decided the claim; instead, it also includes "any other material from the record before the Secretary and the Board relevant to the Board decision on appeal." U.S. Vet. App. R. 10(a)(1)-(2). Similarly, the record of proceedings is not limited to portions of the record before the agency cited in the briefs but instead must also include "any . . . documents before the Secretary and the Board that are relevant to the issues before the Board that are on appeal to the Court or relevant to issues otherwise raised in the appeal." U.S. Vet. App. R. 28.1(a)(1)(C). This includes relevant facts known to the agency, regardless of whether they are outcome determinative. Otherwise, the Board is permitted to adjudicate claims with blinders on, feigning ignorance of relevant facts even as VA

admits it knows about those facts. As this Court has explained, "all records in [the government's] possession relevant to the merits of a case" must be part of the record of proceedings. *Barrett*, 466 F.3d at 1043; *see also Bell*, 2 Vet.App. at 612 (refusing to accept the Board's ignorance of facts within its constructive notice).

Additionally, all "applicable provisions of law" in an herbicide exposure case include § 1116, so the Court must ensure that the Board gives the statute due consideration in developing and deciding the claim. 38 U.S.C. § 7104(a). The fact that § 1116 was not passed for the purpose of "adjudicating individual claims" notwithstanding, Appx9, it has some practical relevance to a claim based on herbicide exposure, *McGee*, 511 F.3d 1358. It suggests that the *Updates*, in turn, might contain pertinent and procurable data about the etiology of an herbicide-exposed veteran's condition. *See* 38 U.S.C. § 1116(b); 38 C.F.R. § 3.102. As the Veterans Court has recognized, "[t]he existence of presumptive service connection for a condition based on exposure to Agent Orange presupposes that it is possible for medical evidence to prove such a link before the National Academy of Sciences recognizes a positive association." *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007). In other words, even absent a showing of statistical significance, the *Update* might still indicate a link between an individual veteran's condition and herbicide exposure, and thus it is relevant to his or her claim. The Veterans Court's responsibility is ensuring that the claim is developed and decided accordingly. *See McGee*, 511 F.3d at 1357.

The Veterans Court's review of agency action must be based on all the relevant facts known to the agency, not just those "specific to" the claimant. Appx10. This includes "general information about the type of disability on appeal." Appx8. By refusing to look at the *Update* for purposes of reviewing the Board's denial of Mr. Euzebio's claim, the Veterans Court misinterpreted the scope of its statutory jurisdiction.

3. The direct relationship requirement is inconsistent with the scope of VA's statutory duty to assist

Because it insulates the agency's feigned ignorance of relevant facts from judicial review, the Veterans Court's "direct relationship" requirement impermissibly burdens a claimant with developing the administrative and thus the appellate record with relevant facts already known to the agency, or else risk the agency's failure to develop and consider a complete record being immune from judicial review. The Veterans Court noted that "the Board was not requested to" consider the Update in Mr. Euzebio's case. Appx9. This, however, misinterprets the scope of VA's duty to assist.

Pursuant to that duty, "[t]he 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" and shall do so unless "no reasonable possibility exists that such assistance would aid in substantiating the

claim." 38 U.S.C. § 5103A(a)(1)-(2). This includes obtaining relevant records that are in federal custody. *See* 38 U.S.C. § 5103A(a); 38 C.F.R. § 3.159(c)(2) (2018). "Congress has explicitly defined the VA's duty to assist a veteran with the factual development of a benefit claim in terms of relevance." *McGee*, 511 F.3d at 1357.

Thus, the Secretary must assist a claimant in developing "all relevant facts, not just those for or against the claim." *Murphy v. Derwinski*, 1 Vet.App. 78, 81-82 (1990). Congress stated, "[a]lthough the claimant has the burden of submitting evidence in support of the claim," when "the material . . . needed to make the determination on eligibility" is "in the control of the Federal Government," "VA should be responsible for providing [it]." S. Rep. No. 418, 100th Cong., 2nd Sess., 33-34 (1988)). When Congress later "reaffirm[ed] and clarifi[ed]" the duty to assist, it stressed that it "expect[ed] that the VA will . . . identify and obtain all of the relevant evidence necessary to make an accurate decision on the claim when it is first presented." 146 Cong. Rec. H9912, H9916 (daily ed. Oct. 17, 2000) (statement of Rep. Evans).

The "direct relationship" standard impermissibly narrows the scope of this duty. "Relevant" means "[l]ogically connected and tending to prove or disprove a matter in issue; having appreciable probative value—that is, rationally tending to persuade people of the probability or possibility of some alleged fact." *Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010) (internal quotation marks omitted). Like the rejected standards in *Hodge* and *McGee*, a "direct relationship" is higher, permitting VA to refuse to develop a claimant's record with facts that are not

outcome-determinative, even if it knows about them, unless it is "requested to" do so. Appx9. The clues the Veterans Court gave to the meaning of "direct relationship" demonstrate this, excluding "general information about the type of disability on appeal" and evidence not "specific to" a claimant from evidence that has a "direct relationship" to the claim. Appx8; Appx10.

Because it exceeds a relevance standard, the "direct relationship" standard is inconsistent with the scope of VA's duty to assist. VA must "assist the veteran claimant with fully developing a record before making a decision on the veteran's claim." *McGee*, 511 F.3d at 1357 (citing 38 U.S.C. §§ 5103A and 7104). This includes identifying relevant facts within VA's knowledge and developing the record with them. To that end, "[t]he legal standard for relevance requires VA *to examine the information it has* related to medical records and if there exists a reasonable possibility that the records could help the veteran substantiate his claim for benefits, the duty to assist requires VA to obtain the records." *Golz*, 590 F.3d at 1323.

The Veterans Court's own rules, moreover, charge the Secretary with the responsibility of ensuring that relevant evidence is part of the record before the agency and thus the record on appeal, even if it is not "requested to" do so. Appx9; *see* U.S. Vet. App. R. 10, 28.1; *see also Barrett*, 466 F.3d at 1043. That this responsibility lies with the Secretary makes sense, considering that "the full breadth of the information possessed by the DVA and the content of a veteran's claim file is generally not known to a veteran, if ever, until after the record on appeal has been

designated and transmitted." *Barrett*, 466 F.3d at 1043. As the Veterans Court has acknowledged, "[v]ery few claimants have ready access to any medical treatises." *Hatlestad v. Derwinski*, 3 Vet.App. 213, 217 (1992), *opinion modified on reconsideration sub nom. Hatlestad v. Brown*, 5 Vet.App. 524 (1993).

The Veterans Court's "direct relationship" requirement is inconsistent with the duty to assist because it shifts to claimants the burden of identifying and obtaining relevant evidence that VA knows about. Appx8. Congress expressly rejected this type of burden-shifting when it eliminated "the requirement that a claimant first submit a 'well-grounded claim'"—that is, "one that included supporting medical opinion and evidence"—"*before* receiving assistance from the VA Secretary." 146 Cong. Rec. H6786 (daily ed. July 25, 2000) (statement of Rep. Bilirakis) (emphasis added). The Veterans Court's rule is erroneous because it effectively resurrects this requirement.

C. The Veterans Court's error was prejudicial

The Veterans Court's use of an erroneous legal standard was prejudicial because general information about the health effects of herbicide exposure was relevant to Mr. Euzebio's claim that his condition was related to his exposure to herbicide agents in the Republic of Vietnam. Regardless of whether it is "specific to" Mr. Euzebio or would entitle him to benefits, the *Update* could entitle him to a VA medical examination, and for this reason, it is relevant. The "low threshold" a

claimant must clear to be entitled to an examination "requires only that the evidence 'indicates' that there 'may' be a nexus" between his or her current disability and an in-service event. *McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006) (quoting 38 U.S.C. § 5103(d)(2)(B)). "[M]edical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits" can "'indicate[ ]' that a disability . . . 'may be associated with the claimant's . . . service'" and is therefore relevant. *Id.* (quoting 38 U.S.C. § 5103(d)(2)(B)).

Because the *Update* "generally discusses whether a myriad of conditions may be related to [herbicide exposure]," Appx10, it could provide that indication by "suggest[ing] a nexus" even if it "is too equivocal or lacking in specificity to support a decision on the merits," *McLendon*, 20 Vet.App. at 83. To that end, the *Update* contains findings that might meet this low threshold. In one study considered by the committee, "[t]hyroid conditions overall . . . showed an indication of increased risk with herbicide exposure." Appx78. The Committee also noted "consistent observations of exposures to [herbicide agents] being related to perturbations of thyroid function." Appx78.

Had the Veterans Court considered the *Update*, it might have determined that the Board prejudiced Mr. Euzebio by failing to consider whether the *Update* satisfied *McLendon*'s low threshold. *See McClendon*, 20 Vet.App. at 83. The Board found that Mr. Euzebio's "conclusory generalized statements . . . are insufficient to meet even the low burden triggering VA's duty to assist in providing an examination and medical

opinion." Appx64. Even assuming the Board erred in that regard, the Veterans Court found the error harmless. Appx14-15. Considering only the evidence physically part of the record of proceedings, the Court agreed that Mr. Euzebio did not provide any factual basis for his claim for service connection "apart from his general lay statements," which were "insufficient to satisfy *McLendon*'s low threshold." Appx14. Had the Veterans Court considered all the relevant evidence that was reasonably within the Board's control, however, the outcome might have been different.

Conclusion and Request for Relief

The Veterans Court erred when it held that a document must bear a direct relationship to a claimant's appeal to be part of the evidence and material in the record before the Board. The "direct relationship" requirement permits the agency to feign ignorance of relevant evidence of which it is aware. However, judicial review exists to ensure that VA fulfills its duty to develop the record. And, throughout the statutory scheme for VA claims adjudication, relevance is the standard that defines the scope of that duty. By allowing the agency to ignore relevant evidence, the Veterans Court misinterpreted the scope of both its jurisdiction and the agency's duty to develop the record.

Appellant therefore asks that this Court

- Take jurisdiction of this matter;

- Hold that, when the Board is on actual notice of relevant evidence, it must consider it, and that relevant evidence is not limited to evidence specific to the claimant; or, alternatively, that developing the record with relevant evidence known to VA is within the scope of the duty to assist, and that the Veterans Court has authority to review the agency's failure to do so;
- Vacate the decision of the Veterans Court and remand with instructions that the court use the correct rule of law in adjudicating the Board's decision.

Respectfully submitted,

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Certificate of Service

I certify that on February 21, 2020, a copy of this pleading was filed electronically and served on all parties by operation of the Court's electronic filing system.

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Certificate of Compliance

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure Appellant's counsel certifies that this Brief complies with the Court's type-volume limitation rules. This brief was printed in Garamond font at 14 points. According to the word-count calculated using Microsoft Word 2013, this Brief contains a total of 6815 words, which is within the 13,000-word limit.

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