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

REPLY BRIEF OF APPELLANT ROBERT M. EUZEBIO

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Appellant's Reply Arguments

Throughout his brief, the Secretary ignores that the Board admittedly knew about the *Update* when it decided Mr. Euzebio's claim. Because it did, this case is not about what to do when a claimant discovers new evidence or judicial hindsight. Nor is about the Veterans Court's jurisdiction, which existed by virtue of the Board's final, adverse decision.

Instead, this case is about whether the Board must account for known information that is relevant to a veteran's claim in deciding whether to get a medical opinion and whether the Veterans Court has the responsibility to ensure that the Board does so. The answer to both questions must be yes, based on the Board's responsibilities under 38 U.S.C. §§ 5103A, 5107(b), and 7104(a); the pro-claimant nature of veterans benefits adjudication; and the purpose and scope of the Veterans Court's review of agency action.

I. The Secretary is wrong that the record before the Board is limited to the claims file.

A. The record before the Board includes known, relevant facts, and not just the claims file.

The Secretary does not and cannot dispute that Congress contemplated that the Board would "take notice (as courts are able to take judicial notice) of matters not on the record" in exercising its jurisdiction under § 7104(a). *The Proposed Veterans' Admin. Adjudication Procedure and Jud. Rev. and Veterans' Jud. Rev. Acts, Hearing on S. 11 and S. 2292 Before the S. Comm. on Veterans' Affairs*, 100th Cong. 741 (1988); *see* Appellant's Br.

at 8-9. Therefore, under § 7104(a), the record before the Board is not limited to the claims file but also includes the Board's knowledge. In this way, the statute incorporates the concept of official notice into the meaning of what is before the Secretary and the Board.

Nevertheless, the Secretary contends that (1) the Board has discretion to ignore what it knows; (2) an irrelevant distinction makes the reasoning of *Banks v. Schweiker*, 654 F.2d 637 (9th Cir. 1981), inapt; and (3) the *Update* contains "adjudicative" facts not appropriate for official notice. Sec. Br. at 22-24. The Court should reject these contentions.

First, because § 7104(a) requires the Board to base adjudications on known facts, a Board member's willful ignorance of the *Update* in select cases is not an exercise of discretion but is instead "not in accordance with law." 38 U.S.C. § 7261(a)(3)(A). And, even if taking official notice were discretionary, discretion is not a license to treat similarly situated claimants differently. *See* Appx16-17 (Allen, J., dissenting). "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). The limiting standard here is relevance. *Cf. id.* at 141 (placing a reasonableness limitation on the district court's discretion where Congress had not created an express limitation). If agency knowledge is relevant to a kind of claim, then the agency must use that

knowledge in adjudicating that type of claim—it is equally a part of the record before the agency as the claims file is.

And, given the uniquely pro-claimant nature of veterans benefits adjudication, cases regarding the Immigration and Naturalization Service's broad discretion to take official notice are inapposite. *See* Sec. Br. at 22-24. Of course, the INS's discretion is not constrained by a pro-claimant, non-adversarial system, but VA's is. *See* Appellant's Br. at 12 (citing *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998)). Given these constraints, the Secretary's reliance on these cases is misplaced.

A system of claims adjudication in which a Board member can "ignore the *Update* she knows exists and that she has just read" is not rational, let alone pro-veteran and nonadversarial. Appx17 (Allen, J., dissenting). Yet this is the system that currently exists because of the lower court's decision, with some veterans benefiting from what the Secretary and the Board know while others do not.

There is already evidence of the arbitrary system the Veterans Court's decision has promoted. Citing the lower court's decision, one Board member decided to recognize the *Update* and provided the veteran with a medical opinion as a result, even though, "as a general matter, such non-record materials are not constructively before the Board." Title Redacted by Agency, No. 14-20 195, 2020 WL 1547532, at *1 (Bd. Vet. App. Jan. 10, 2020); *see also* Title Redacted by Agency, No. 191210-53173, 2020 WL 2828737 (Bd. Vet. App. Mar. 23, 2020) (also recognizing the *Update*); Title Redacted by Agency, No. 190206-2680, 2019 WL 6267094 (Bd. Vet. App. Sept. 20,

2019) (same). In contrast, another Board member decided, "Although the Board is generally aware of a more recent update of this study, it is not constructively before the Board and, thus, it could not satisfy VA's duty to assist for a supplemental opinion." Title Redacted by Agency, No. 11-06 302, 2019 WL 6262231, at *5 (Bd. Vet. App. Sept. 12, 2019).

In this case, the very Board member who decided Mr. Euzebio's appeal previously had demonstrated his awareness that the *Update* contains information regarding the health effects of exposure to herbicides. *See*, *e.g.*, Title Redacted by Agency, No. 14-20 857, 2016 WL 877446, at *3 (Bd. Vet. App. Jan. 28, 2016); Title Redacted by Agency, No. 11-24 285, 2014 WL 2763435, at *2 (Bd. Vet. App. Apr. 30, 2014). But, when addressing Mr. Euzebio's claim, he treated the report—which he admittedly knew about—as if it were irrelevant to whether there may be an indication that Mr. Euzebio's condition is related to his herbicide exposure. Appx66-69.

As the foregoing shows, leaving it up to individual Board members "what evidence [they] sua sponte take into account in deciding appeals," as the lower court has done, engenders a system of adjudication without the appearance or reality of fairness. Appx11 n.8.

Second, the pro-claimant and non-adversarial nature of the VA system implicates the reasoning in *Banks*, and the trivial distinction the Secretary references—that it did not consider an agency's *not* taking official notice—does not make its reasoning inapt. Sec. Br. at 22. *Banks* stated that Social Security Administration's

adjudicators "should take notice of adjudicative facts, whenever, 'the ALJ at the hearing knows of information that will be useful in making the decision.'" *Banks*, 654 F.2d at 641; *see* Appellant's Br. at 10-11. Taking official notice is consistent with "[t]he essence of the [hearing] examiner's duty under the [Social Security] Act . . . to fully and fairly develop the facts." *Sellars v. Sec'y, Dep't of Health, Educ. & Welfare*, 458 F.2d 984, 986 (8th Cir. 1972). A VA adjudicator's duty goes even farther than the SSA hearing officer's: "to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a) (2020). Given the broader scope of a VA adjudicator's duty—and the incorporation of official notice into the history of § 7104(a)—the reasoning of *Banks* applies with at least equal force here.

Third, the Secretary is mistaken that the facts the Board should have noticed here were "adjudicative"—that is, specific to Mr. Euzebio—because they were "determinative of . . . entitlement to a VA examination or opinion." Sec. Br. at 24. On the contrary, evidence can be determinative of entitlement to a medical opinion and yet "too equivocal or lacking in specificity to support a decision on the merits." *McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006).

Besides, accepting the Secretary's reasoning would lead to an absurd rule: the type of facts the Secretary agrees are subject to official notice—"technical or scientific facts that are within the agency's area of expertise," Sec. Br. at 22; *see also Sykes v. Apfel*,

228 F.3d 259, 272 (3d Cir. 2000)—would be excluded from the agency's notice because they trigger the agency's duty to assist under *McLendon*.

B. The Secretary fails to show how a "unitary" record cannot contain both items from the claims file and relevant facts within the Board's knowledge.

The Secretary argues that the record before the Secretary and the Board cannot include "additional documents separate from the adjudicative proceedings" because "the record" is "single" or "unitary," and it would be "wholly anomalous as a matter of adjudicative process." Sec. Br. at 19. Setting aside the facial absurdity of the suggestion that the "record" is some immutable, indivisible entity, the Secretary himself undermines it. As he correctly notes elsewhere, the record before the agency has multiple, discrete ingredients. *Id.* at 18. He also acknowledges that "adding to [the record] as appropriate" is in fact a hallmark of the adjudicative process. *Id.* at 20. Additionally, in his own regulation, he has provided that "relevant documents possessed by the Department of Veterans Affairs" that "could reasonably be expected to be part of the record" can be added to the record. 38 C.F.R. § 20.1403(b)(2) (2020). For these reasons, the Secretary is wrong that the nature of the "record" prohibits including the Board's relevant knowledge.

C. The constructive possession doctrine is good law.

In addition to arguing that the *Update* was not constructively part of Mr. Euzebio's record, the Secretary invites this Court to invalidate the constructive

possession doctrine of *Bell v. Derwinski*, 2 Vet.App. 611 (1992). Sec. Br. at 33-37. The Court should reject that invitation.

Above all, the Secretary is wrong that the *Bell* court's refusal to "accept the Board being 'unaware'" of evidence in VA's possession and known to the Board, *Bell*, 2 Vet.App. at 612, "lacks any legal foundation," Sec. Br. at 35. The Board's jurisdictional statute prohibits it from willfully ignoring known facts. *See* 38 U.S.C. § 7104(a). And the statutes governing the Court's review prohibit it from allowing the Board to do so with impunity. *See* 38 U.S.C. §§ 7252(b), 7261(a)(3). These mandates are consistent with VA's duties to use what it knows to determine what development of a claim is needed and to develop all claims to their optimum. 38 U.S.C. § 5103A. The *Bell* court might not have fully explicated this foundation for the constructive possession doctrine, but the foundation is there.

Another basis of the Secretary's invitation to invalidate the *Bell* doctrine is circular. He contends that the doctrine is contrary to § 7252(b) because, although the statute refers only to the record that was *actually* before the Secretary and the Board, *Bell* held that "documents that were not [actually] before VA adjudicators" were nonetheless before the Court. Sec. Br. at 34. But this is exactly how a constructive rule works. *See* Black's Law Dictionary (11th ed. 2019) (defining "constructive" as "Legally imputed; existing by virtue of legal fiction though not existing in fact"). That is, facts known to the agency when it adjudicated the claim *should be* in the record and therefore are, for practical purposes, before the Court. *Bell*, 2 Vet.App. at 612-13.

Reasoning that they cannot be *constructively* in the record because they were not *actually* in the record is just a tautology. *See* Sec. Br. at 34, 35-36; *see also id.* at 18-20.

The Secretary also confuses constructive possession with the irrelevant concept of constructive knowledge. *See* Sec. Br. at 34-35. In *Bell*, the Board arguably had "actual[] knowledge of those items" that the Court deemed to be "'before the Secretary and the Board' when the BVA decision was made." *Bell*, 2 Vet.App. at 613. To the extent the *Bell* doctrine presupposes VA's actual knowledge of the facts in question, the Secretary's attempt to undermine it with cases about constructive knowledge must fail. *See* Sec. Br. at 34-35 (collecting cases regarding constructive knowledge). Constructive knowledge is even less relevant in this case because it has never been in dispute that the Board actually knew about the *Update* when it adjudicated Mr. Euzebio's appeal. *See* Appx4, Appx66. The *Update* "is not something obscure or something that one could say only that the Board should have known." Appx19 (Allen, J., dissenting).

Additionally, the Secretary overstates the Court's role under the *Bell* doctrine, raising illusory concerns regarding jurisdiction and the scope or standard of review. Sec. Br. at 36-37. In refusing to accept the Board's being unaware of known facts, the Veterans Court is not engaging in fact finding. *But see id.* Rather, the Court's role is limited to remanding for readjudication if the ignored facts could be determinative of the claim. *Bell*, 2 Vet.App. at 613. This is akin to a prejudicial error analysis, which the Court is fully authorized to perform. *Cf. Simmons v. Wilkie*, 30 Vet.App. 267, 279

(2018) (describing as harmful an error that "could have affected the outcome of the determination"). In Mr. Euzebio's case, the lower court would have been limited to determining whether the Board might have ordered a medical opinion had it considered the *Update*. This is fully consistent with its standard of review of the Board's analysis under *McLendon*, 20 Vet.App. at 83.

Finally, the Secretary neglects to mention that he has codified the *Bell* doctrine in his own regulation. *See* 38 C.F.R. § 20.1403(b)(2). Defining "the record that existed when [a prior Board] decision was made" in legacy cases, the Secretary's rule provides that, if the Board issued the decision on or after the date *Bell* was decided, that record "includes relevant documents possessed by the Department of Veterans Affairs not later than 90 days before such record was transferred to the Board for review in reaching that decision, provided that the documents could reasonably be expected to be part of the record." *Id.* If the Secretary wishes to eliminate it from his regulation, he can initiate notice and comment.

Regardless of the fate of the regulation, when this Court initially upheld the rule, it suggested that *Bell* was correctly decided, endorsing "a limited constructive notice rule." *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 697 (Fed. Cir. 2000). It should expressly validate the constructive possession doctrine in *Bell* now.

D. Concepts of "new" evidence have no bearing on facts the Board already knew about when it adjudicated the claim.

Because the Board concededly knew about the *Update*, it was part of the record when the Board previously adjudicated Mr. Euzebio's claim. Thus, it is not "newly discovered evidence" under 38 U.S.C. § 5108 and 38 C.F.R. § 3.156 (2020), and submitting the *Update* with a request to reopen his claim is not "[t]he path to resolve the situation [Mr. Euzebio] finds himself in." Sec. Br. at 15.

Mr. Euzebio did not "discover[] [the *Update*] following the final denial of his claim by the board." *Id.* at 14-15. Facts the agency already knows about, but chooses to ignore, do not lie around until a claimant points them out, awaiting "discover[y]." *But see id.* at 14-15. Rather, "the VA's actual knowledge of the existence of" relevant facts imposes on the agency a duty to consider and/or develop them. *See Murincsak v. Derwinski*, 2 Vet.App. 363, 371 (1992). Accepting the Secretary's contrary premise would validate the same head-in-the-sand behavior by Board adjudicators that the Veterans Court endorsed. Appx8-11.

Submitting the *Update* now also would not protect Mr. Euzebio in the way the Secretary suggests. He asserts that, if Mr. Euzebio submitted the *Update* as "newly discovered evidence," the effective date of his award could be as early as the date of his original, July 2012 claim if he prevailed. Sec. Br. at 15; *see* Appx50. However, either (1) the Secretary has failed to recognize that Mr. Euzebio's claim was not processed under VA's modernized review system or (2) he has misunderstood how

section 3.156 applies to claims like Mr. Euzebio's, processed under the prior, legacy system.

Under the modernized review system, a claimant who receives an adverse Board decision can indeed preserve the effective date established by his initial claim by submitting "new and relevant" evidence within one year of the Board's decision. *See* 38 C.F.R. § 3.156(d) (2020); 38 C.F.R. § 3.2500(c)(3), (h)(1) (2020); 38 C.F.R. § 3.2501 (2020). However, Mr. Euzebio is not that claimant because the Board decided his appeal under the legacy system, more than one and one-half years before the modernized system took effect. *See* 38 C.F.R. § 3.2400 (2020); 38 C.F.R. § 19.2 (2020); Appx50, Appx60.

And a legacy claimant like Mr. Euzebio cannot preserve his effective date by submitting "new and material" evidence after an adverse Board decision. *See* 38 C.F.R. § 3.156(b). He can only do so by submitting such evidence within a year of the initial VA decision or prior to the Board's decision. *Id.* Otherwise, the effective date is the date such evidence was received. *Id.* § 3.156(a); 38 C.F.R. § 3.400(q), (r) (2020).

Because it is based on the false premise that the *Update* is "new" evidence and on a misunderstanding of applicable law, the Court should reject the Secretary's argument that Mr. Euzebio has recourse to section 3.156.

II. The Secretary is wrong that the Veterans Court used the correct standard—relevance—to determine whether the *Update* was part of the record.

The Secretary argues that this Court cannot review the lower court's finding that the *Update* did not have a direct relationship to Mr. Euzebio's claim, that a direct relationship requirement is harmonious with existing rules governing the agency and the court, and that any lower standard would require only a "tenuous" relationship and be unworkable. Sec. Br. at 40-41, 43-47. All these arguments rest on the same, mistaken legal premise—that "directly related" and "relevant" are the same standard—and, accordingly, they should fail.

A. Directly related—the incorrect standard the Veterans Court used—is a higher standard than relevant.

At first, the Secretary agrees that "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." Sec. Br. at 39 (quoting Black's Law Dictionary); *cf.* Appellant's Br. at 22 (quoting *Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010).

But he demonstrates that this is not, in fact, his understanding of relevance, when he argues that "general information about the type of disability on appeal," Appx8, is not relevant. Sec. Br. at 39-40. General information about the type of disability on appeal—that is, a claimed health effect of herbicide exposure—is relevant because information about the health effects of herbicide exposure is logically

connected to and tends to be probative of a matter in issue—whether development of additional medical evidence on the nexus question is warranted. *See Golz*, 590 F.3d at 1321. "[R]elevant facts" are "not just those for or against the claim." *Murphy v. Derwinski*, 1 Vet.App. 78, 82 (1990). To emphasize—to be relevant, a fact need not even establish that a nexus examination is warranted, let alone that a nexus exists; rather, it need only tend to show that there is a reasonable possibility that an examination would substantiate the claim. *See Golz*, 590 F.3d at 1323 (equating "[t]he legal standard for relevance" with the "exist[ence] [of] a reasonable possibility . . . [of] help[ing] the veteran substantiate his claim for benefits").

"[G]eneral information about the type of disability on appeal" did not meet the lower Court's test because that test—that the information be directly related to the claim—was wrong. Appx8. The inquiry that was before the Board in this case illustrates why. "[A] matter in issue" in this case, *Golz*, 590 F.3d at 1321, was whether there is an "indication" that Mr. Euzebio's condition "may be related" to herbicide exposure, *McLendon*, 20 Vet.App. at 83. And medical evidence that is "too . . . lacking in specificity to support a decision on the merits," *id.*, is nonetheless "[l]ogically connected and tending to prove or disprove" that matter in issue, *Golz*, 590 F.3d at 1321 (quoting Black's Law Dictionary 1316 (8th ed. 2004)). In sum, in this analysis, evidence that does *not* directly relate to the claimant can still be relevant to the question at issue. But that is exactly what the Court required—evidence "specific to Mr. Euzebio"—so it held that evidence "discuss[ing] whether a myriad of conditions

may be related to AO" is not before the Board in the case of a claimant who was exposed to herbicide agents and is claiming benefits for a health effect of that exposure. Appx10. In this regard, the Secretary is similarly mistaken that the fact in issue is "the cause of an individual person's condition." Sec. Br. at 31.

When the standard the Veterans Court imposed is viewed considering the *McLendon* inquiry before the Board, the Secretary's argument that the standard was not outcome determinative must fail. *See* Sec. Br. at 41. By requiring evidence "specific to" Mr. Euzebio, the Veterans Court required a stronger connection *to place evidence before the Board* than the law requires *to trigger a medical opinion*. *See* Appx18 (Allen, J., dissenting) ("[O]ne can't defend the decision on the basis that the *Update* was not likely to trigger a *McLendon* analysis."). In other words, it held the *Update* to a standard of "requir[ing] a specific legal result, such as the imposition of an obligation on the Secretary"—to obtain an examination—to be before the Board. *McGee v. Peake*, 511 F.3d 1352, 1356 (Fed. Cir. 2008). But the proper inquiry was akin to whether the *Update* had "some practical relevance to [the Board's] decision." *Id.*

Finally, the Secretary's reliance on *Monzingo v. Shinseki*, 26 Vet.App. 97 (2012), and *Goodwin v. West*, 11 Vet.App. 494 (1998), like the lower court's, is misplaced. Sec. Br. at 38-39; Appx6-10. Even assuming the Court applied a relevance standard in those cases—it did not—any comparison between the documents at issue in them and the *Update* is inapt. In *Monzingo*, the Court held that a report regarding noise exposure and service had "too tenuous" a relationship to a hearing loss claim based,

not on noise exposure, but on hearing loss beginning in service. *Monzingo*, 26 Vet.App. at 99, 103. And in *Goodwin*, the Court held that documents "relat[ing] to claims for VA benefits for an individual other than the appellant . . . could not 'reasonably be expected to be a part of the record "before the Secretary and the Board."'" *Goodwin*, 11 Vet.App. at 496 (quoting *Bell*, 2 Vet.App. at 613 (quoting 38 U.S.C. § 7252(b))). The *Update* is distinguishable from both: it deals with the in-service event that is the basis of the claim, and it contains generally applicable information, not information specifically related to another claimant.

Accordingly, the Court should reject the Secretary's argument that the Veterans Court applied a relevance standard to hold that the *Update* was not before the Board.

B. Relevance is the legally correct test for determining whether the Board must consider known facts.

Having falsely equated relevant with directly related, the Secretary argues that any lesser standard—that is, an actual relevance standard—is neither legally required nor workable. He is wrong on both counts. The Board's existing statutory and regulatory duties dictate a relevance standard—and not the "direct relationship" standard the lower court imposed. To be "applicable" to the Board's decision and thus require consideration under § 7104(a), a law need only "have some practical relevance" to the claim. *McGee*, 511 F.3d at 1356–57. It follows that, for the Board's knowledge to be part of the record under that statute, it also need not "require a specific . . . result" but only have "some practical relevance" to the claim. *Id.*

A true relevance standard is consistent with the requirement that VA provide any assistance that has a reasonable possibility of substantiating the claim. *See* 38 U.S.C. § 5103A. In this regard, the Veterans Court has recognized that relevant facts include more than "just those for or against the claim." *Murphy*, 1 Vet.App. at 81-82; *cf. McGee*, 511 F.3d at 1356-57. Relevant evidence is not limited to evidence stating, for example, that herbicide exposure causes thyroid nodules. *But see* Sec. Br. at 23, 25, 31, 42, 44; Appx8 & n.4; *see* Appx18 (Allen, J., dissenting).

In terms of workability, relevance bests a vague requirement that a document "not relate too tenuously" to a claim, the standard the Secretary proposes and the Veterans Court used. Sec. Br. at 38; *see also* Appx6-8. Unlike "direct relationship," and "too tenuously," Sec. Br. at 38, standards of relevance and reasonableness, *see* Br. for Nat'l Veterans Legal Serv. Program as Amicus Curiae at 24, have agreed-upon definitions in the law, *see*, *e.g.*, *Golz*, 590 F.3d at 1321, and Courts routinely apply them, *see*, *e.g.*, *Martin*, 546 U.S. at 141 (placing a reasonableness limitation on the district court's discretion).

The Secretary's argument that a relevance standard would place "an impossible burden" on the agency is demonstrably false. Sec. Br. at 40. In legions of cases, adjudicators already *do* consider the *Update*. And it is not "located somewhere in the bowels of VA, tucked away in the desk of some bureaucrat never to be read." Appx19 (Allen, J., dissenting). Also, from the *Purplebook*, "we know that the Board has the procedures necessary to ensure that [the *Update* is] considered in appropriate

benefits claims." Appx20 (Allen, J., dissenting); *see also* Appellant's Br. at 13; Appx75-76.

Finally, even if all relevant matters known to the Board are not deemed part of the record for fear of opening the floodgates, nevertheless, the *Update* can be viewed in a category by itself. *But see* Sec. Br. at 40. The *Update* is not just any medical evidence known to the Board. Rather, it was created in effort to fully compensate service members exposed to herbicides in Vietnam. *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); Appellant's Br. at 14-15.

Although the Secretary makes much of the lack of a congressional *mandate* to consider the *Update* in individual adjudications, Sec. Br. at 26-33, "that . . . does not mean that the congressional mandate to create [the *Update*] is irrelevant to whether the Board should consider [it] under applicable law in certain individual cases." Appx19 (Allen, J., dissenting) (emphasis omitted); *cf. Saunders v. Wilkie*, 886 F.3d 1356, 1364 (Fed. Cir. 2018) (deeming regulations regarding the assignment of ratings "relevant to the question of whether pain can be a disability" eligible for service connection). And this argument is a straw man. The point is not that Congress's herbicide legislation required consideration of the *Update*, Sec. Br. at 25-26; rather, it is that the Board knows about the *Update* and knows why it was created—to help VA ascertain the health effects of herbicide exposure, Appx19 (Allen, J., dissenting). That knowledge of the *Update* and its relevance makes it part of the record before the agency and the

Board in claims based on herbicide exposure. The Court can decide that the *Update* is "unique—more equal than other government reports" without "decid[ing] whether other things could also fall in this special category." Appx21 (Allen, J., dissenting).

III. The Veterans Court can and must review the Board's willful ignorance of known, relevant facts.

Contrary to the Secretary's assertion, whether the *Update* was part of the record on appeal is not a question of the Veterans Court's jurisdiction. *See* Sec. Br. at 17-18. The Court's jurisdiction, which is governed by § 7252(a), derived from the Board's issuance of a final, adverse decision on Mr. Euzebio's claim. Appx69; *see Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 432 (2011) (citing 38 U.S.C. § 7252(a)); *Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1364 (Fed. Cir. 2005) (same); *see also* 38 U.S.C. § 7266(a). Once the Court had jurisdiction over the appeal, it had jurisdiction to address all questions related to the Board's denial of entitlement to service connection, including its willful ignorance of relevant knowledge in doing so. *See Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998). And it had the obligation to decide all relevant questions of law and correct any unlawful agency action or inaction. *See generally* 38 U.S.C. § 7261(a).

The pertinent language from § 7252(b)—that "[r]eview in the Court shall be on the record of proceedings before the Secretary and the Board"—governs *how* the Veteran's Court reviews agency action, not *whether* it can do so. By its plain terms—beginning with "[r]eview in the Court"—it presupposes that the Court has

jurisdiction. 38 U.S.C. § 7252(b). Although it is a subsection of the statute entitled "Jurisdiction; finality of decisions," it defines the scope of the Veterans Court's review. *See Henderson*, 562 U.S. at 439 (observing that "[s]ubsection (b) limits the court's review to 'the record of proceedings before the [VA]' [and] specifies the scope of that review"). This reading is reinforced by the statute's context: both it and 38 U.S.C. § 7261(b), entitled "Scope of review," provide that the Court shall review "the record of proceedings before the Secretary and the Board," and the two provisions reference each other. 38 U.S.C. §§ 7252(b), 7261(b); *see Aqua Prod., Inc. v. Matal*, 872 F.3d 1290, 1307 (Fed. Cir. 2017) (stating that related statutory sections should be read together).

Also, in reading § 7252(b) to insulate the Board's ignoring relevant facts from that court's scrutiny, Sec. Br. at 18, the Secretary overlooks "the 'presumption favoring interpretations of statutes [to] allow judicial review of administrative action.'" *Freeman v. Shinseki*, 24 Vet.App. 404, 414 (2011) (alteration in original) (quoting *Kucana v. Holder*, 558 U.S. 233, 251 (2010)). Indeed, "questionable agency actions restricting, withholding, or withdrawing VA benefits" are what Congress intended the Veterans Court to review. *Am. Legion v. Nicholson*, 21 Vet.App. 1, 5 (2007) (quoting *The Proposed Veterans' Admin. Adjudication Procedure and Jud. Rev. and Veterans' Jud. Rev. Acts, Hearing on S. 11 and S. 2292 Before the S. Comm. on Veterans' Affairs*, 100th Cong. 741 (1988) (remarks of Sen. Alan Cranston)). This includes ignoring relevant knowledge when

developing or deciding a claim. *See* 38 U.S.C. §§ 5103A, 5107(b), 7104(a), 7252(b), 7261(a)(3).

The presumption of reviewability exists because, "especially in nonadversary proceedings" like those before the Board, "the possibility of error is always present." *Freeman*, 24 Vet.App. at 414-15 (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 212 (1985)). Meanwhile, the government has "superior access to information," resulting in "a veteran's informational disadvantage." *Barrett v. Nicholson*, 466 F.3d 1038, 1043 (Fed. Cir. 2006). Judicial review is essential to ensuring that this very disadvantage does not give the agency carte blanche to ignore relevant information. In this regard, the Secretary is mistaken that the record exists solely "for purposes of . . . VA's . . . adjudicative scheme." Sec. Br. at 20. Rather, it also exists for purposes of the Veterans Court's *review* of that process. *Barrett*, 466 F.3d at 1043.

"It . . . takes 'clear and convincing evidence' to dislodge the presumption." *Kucana*, 558 U.S. at 252. There is no evidence, let alone clear and convincing evidence, that Congress intended to immunize willful agency ignorance from judicial review. On the contrary, it authorized the Board—and thus the Veterans Court—to consider "matters not on the record." *The Proposed Veterans' Admin, Adjudication Procedure and Jud. Rev. and Veterans' Jud. Rev. Acts, Hearing on S. 11 and S. 2292 Before the S. Comm. on Veterans' Affairs*, 100th Cong. 741 (1988); *see* 38 U.S.C. §§ 5107(b), 7104(a), 7252(b), 7261(a)(3). The legislative history of the VJRA demonstrates the presumption of reviewability is "particularly pertinent in the context of appeals to [the Veterans]

Court, given that the driving principle that led Congress to create the Court was a desire to ensure fairness in the adjudication of veterans benefits claims by providing the additional safeguard of judicial review of agency decision-making." *Freeman*, 24 Vet.App. at 415.

Kyhn v. Shinseki, 716 F.3d 572 (Fed. Cir. 2013), on which the Secretary relies to argue that the lower Court would exceed its jurisdiction in considering the *Update*, is distinguishable. Sec. Br. at 17-18. *Khyn* involved documents that were created and added to the record during litigation in the Veterans Court and therefore did not exist when the Board made its decision. *Kyhn*, 716 F.3d at 574. Accordingly, there is no question that the documents in *Kyhn* were not part of "the record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252. As a result, *Khyn* does not speak to whether the *Update*—which existed and was known to the Board when it decided Mr. Euzebio's appeal—was before the Board and thus before the Veterans Court. For the same reason, *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009), is inapposite: Mr. Euzebio's case does not involve "supplementation of the record," but instead evidence that was known to the Board all along. *See* Sec. Br. at 36-37.

Affirming the Veterans Court's rule would "allow the government to withhold records . . . [and] thereby restrict[] [veterans'] very access to judicial review." *Barrett*, 466 F.3d 1043. The lower court omitted the *Update* from its review of the Board's duty to assist analysis, permitting the Secretary and the Board to ignore the *Update*

with impunity. *See* Appx11-15. But that Court exists to review unlawful agency acts and omissions, including the omission of known, relevant materials from the record on which it adjudicates a veteran's claim. *See* 38 U.S.C. § 7261(a)(3). This Court should therefore reject the Secretary's argument that the Veterans Court lacked jurisdiction to consider the *Update*.

IV. The Veteran's Court's error was prejudicial.

The Secretary concedes that "a remand would be in order" if this Court agrees with Mr. Euzebio's arguments. Sec. Br. at 47. Nevertheless, throughout his brief, he suggests that the *Update* was not relevant to Mr. Euzebio's claim, which would render the Veterans Court's error harmless. *See id.* at 23, 25, 31, 42, 44. But "one can't defend the [lower court majority's] decision on the basis that the *Update* was not likely to trigger a *McLendon* analysis" because "[t]hat is a downstream issue." Appx18 (Allen, J., dissenting). In this regard, the Secretary's focus on whether the *Update* addresses Mr. Euzebio's specific condition is misplaced. *See* Sec. Br. at 23, 25, 31, 42, 44; *cf.* Appx78 (quoting the *Update*'s finding that "[t]hyroid conditions overall . . . showed an indication of increased risk with herbicide exposure"). And, the specific condition notwithstanding, the type of facts the *Update* contains—generalized "inform[ation] . . . on the evidence regarding possible associations between exposure to chemical compounds contained in herbicides used in Vietnam and health effects"—is relevant to a claim based on herbicide exposure. Health and Medicine Division, *Veterans and Agent Orange: Update 2014* at ix, *available at*

https://www.nap.edu/catalog/21845/veterans-and-agent-orange-update-2014 (last visited June 22, 2020)). "[S]peculation as to the dispositive nature of relevant records" "simply does not excuse . . . VA[] [from its] obligation to fully develop the facts of [the] claim." *McGee*, 511 F.3d at 1358; *see also* Appx18 (Allen, J., dissenting) ("It is not appropriate to 'peek' at what a document says when considering whether it is constructively before the Board."). The Court should reject the contention that the Veterans Court's error was harmless.

Conclusion and Request for Relief

The Veterans Court's decision on Mr. Euzebio's appeal undermines judicial review of agency action by allowing agency adjudicators to ignore relevant facts with impunity. Agency adjudicators' relevant knowledge is part of the record before the Secretary and the Board, and an adjudicator's willful ignorance of that knowledge is a legal error that the Veterans Court must correct. 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 to the Board, insulating the Board's disregard of those matters from judicial review.

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 consider relevant knowledge; and

- Vacate the decision of the Veterans Court and remand with instructions that it 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 July 6, 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, this Brief contains a total of 6074 words, which is within the 7000-word limit.

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