2020-1072

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT M. EUZEBIO,
Claimant-Appellant,

v.

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

United States Court of Appeals for Veterans Claims No. 17-2879,
Judges Allen, Meredith, and Falvey

# BRIEF FOR RESPONDENT-APPELLEE

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## STATEMENT OF COUNSEL

Pursuant to Rule 47.5, respondent-appellee's counsel states that there are no appeals in or from this action that were previously before this Court. Respondent-appellee's counsel is aware of *Marvin H. Johnson v. Robert L. Wilkie, Secretary of Veterans Affairs*, No. 18-6798 (Vet. App.), and *James R. Healey v. Robert L. Wilkie, Secretary of Veterans Affairs*, No. 18-6970 (Vet. App.), that may directly affect or be affected by this Court's decision in this appeal.

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## STATEMENT OF THE ISSUES

1. Whether pursuant to 38 U.S.C. § 7252(b), the "record of proceedings before the Secretary and the Board" of Veterans' Appeals (board) in the appellant's case includes a National Academy of Sciences, Engineering & Medicine (NAS) report, which was not submitted to the Department of Veterans Affairs (VA) by the appellant for consideration of his claim.

2. Whether the board was required to take official notice of the NAS report.

3. Whether the constructive possession doctrine is contrary to the plain meaning of 38 U.S.C. § 7252(b) which limits the review of the United States Court of Appeals for Veterans Claims (Veterans Court) to "the record of

proceedings before the Secretary and the Board," and if not, whether the doctrine applies only if a document has a direct relationship to the claim on appeal.

## STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

### I. Nature of the Case

Claimant-appellant, Robert M. Euzebio, appeals the decision of the Veterans Court in *Robert M. Euzebio v. Robert L. Wilkie, Secretary of Veterans Affairs*, No. 17-2879 (Vet. App. May 30, 2019), affirming the July 20, 2017 board decision denying service connection for benign thyroid nodules.

### II. Statement of Facts and Course of Proceedings Below

Mr. Euzebio served in the U.S. Navy from February 1966 to October 1969, including service in Vietnam and a training course at Camp Lejeune in North Carolina. Appx2.[1] In April 2011, a private physician found Mr. Euzebio's thyroid to be palpable, and another private physician diagnosed a benign thyroid nodule in May 2011. Appx2.

#### A. Administrative Proceedings

In May 2011, Mr. Euzebio filed a claim for thyroid nodules that he believed to be related to his exposure to Agent Orange (AO) in Vietnam. Appx2, Appx40. In August 2011, a private physician stated: "[The appellant] is known to have

[1] "Appx__" refers to the joint appendix for this appeal.

some nodules in the thyroid felt to be related to [AO] exposure in Viet[n]am. This is the first he has mentioned this to me." Appx2. A VA regional office (RO) denied the claim in September 2011. Appx2.

**B. Board Proceedings**

Mr. Euzebio disagreed with the decision and requested a VA examination to evaluate whether his benign thyroid nodules are related to service. Appx2. He later perfected his appeal to the board, asserting that he believed his claimed condition is related to AO exposure in Vietnam and to contaminated water at Camp Lejeune because he has no family history of thyroid problems. Appx2. He reiterated at a January 2017 board hearing that he believed his benign thyroid nodules are related to AO exposure because herbicides are known to cause "many different [conditions]" and no one in his family has had a thyroid condition. Appx2.

On July 20, 2017, the board denied his disability claim for benign thyroid nodules, including as due to exposure to AO or water contaminants at Camp Lejeune. Appx2. The board "acknowledge[d] that the [appellant had] not been afforded a VA examination with respect to this case," but found that VA satisfied its duty to assist. Appx2. In discussing the four-part test set forth in *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006), governing whether a VA examination is warranted pursuant to 38 U.S.C. § 5103A(d), the board noted that Mr. Euzebio

had asserted that his benign thyroid nodules were related to exposure to AO while serving in Vietnam and drinking contaminated water at Camp Lejeune.[2] Appx2-3. However, the board discounted the probative value of these statements because it found that Mr. Euzebio was not competent to opine as to a nexus between his thyroid nodules and AO exposure. Appx3. The board therefore determined that his conclusory generalized statements were "insufficient to meet even the low burden triggering VA's duty to assist in providing an examination and medical opinion." Appx3.

The board denied service connection on a direct basis because there was no "competent evidence indicating a causal link between the [appellant's] thyroid disorder and military service." Appx3. The board noted that the service treatment records were silent for a thyroid disability; Mr. Euzebio's "thyroid nodules were first observed in April 2011, more than 40 years after military service;" and he was not competent to provide a nexus opinion. Appx3. The board also found that, although the August 2011 private treatment record contained a notation that he was "known to have [thyroid nodules], felt to be related to AO exposure in

[2] In *McLendon*, 20 Vet. App. at 81, the court held that an examination is required when there is (1) competent evidence of a current disability or recurrent symptoms, (2) evidence establishing an "in-service event, injury or disease," (3) an indication that the current disability may be related to the in-service event, and (4) insufficient evidence to decide the case.

Vietnam," the physician "immediately note[d] that this . . . was the first time the [appellant] had mentioned this." Appx3. The board found that it was "more likely" that the suggestion of a nexus was "made by the [appellant] and relayed to the physician, rather than a conclusion formed by [a medical professional]," and, therefore, the physician's mere notation of Mr. Euzebio's theory did not render his statements competent or any more probative. Appx3.

**C. Veterans Court Decision**

In a May 30, 2019, decision, the Veterans Court affirmed the board's decision.[3] Appx2.

**1. Arguments on Appeal**

On appeal to the Veterans Court, Mr. Euzebio argued that the board erred in finding that VA's duty to assist did not require VA to provide a medical examination to address whether there is a nexus between his benign thyroid nodules and exposure to agent orange in Vietnam. Appx3-4. He argued that the National Academies of Sciences (NAS) Veterans and Agent Orange: Update 2014 (2016), *available at https://www.nap.edu/download/21845#*, which stated that there is "limited or suggestive evidence of an association" between

[3] The Veterans Court found that Mr. Euzebio abandoned his appeal of the issue of presumptive service connection based on service at Camp Lejeune because he did not raise any argument regarding this issue. Appx1.

hypothyroidism and AO, was constructively before the board because VA knew of the report's content as evidenced by a 2017 VA press release and AO newsletter. Appx4. He contended that *Update 2014* provided an "indication" that his benign thyroid nodules "may be associated with . . . service," thereby entitling him to a VA medical examination pursuant to *McLendon*, 20 Vet. App. at 81. Appx4; *see* 38 U.S.C. § 5103A(d)(2). Mr. Euzebio did not argue that hypothyroidism is the same condition as benign thyroid nodules, but he did argue that whether there is enough of a relationship between hypothyroidism and benign thyroid nodules is a medical question and *Update 2014* goes to the nexus question on the merits of his claim for service connection for benign thyroid nodules. Appx8 n.4.

The Secretary responded that, even if VA or the board knew that *Update 2014* existed and contains general information relevant to the thyroid, it cannot be reasonably expected to be before the board here because *Update 2014* was "not specific" to the appellant's claim. Appx4. VA asserted that the only potential relationship between *Update 2014* and the claim is that the report "generally discussed the relationship between hypothyroidism and herbicide exposure and [the a]ppellant[] . . . alleges that his [benign] thyroid [nodule] condition is related to his herbicide exposure." Appx4. However, VA contended that this relationship is "too strained" for *Update 2014* to be reasonably before the board in "every case

involving thyroid conditions and herbicide exposure." Appx4 (citing *Monzingo v. Shinseki*, 26 Vet. App. 97, 103 (2012)).

Mr. Euzebio replied that, because his claim was based in part on exposure to herbicides, 38 U.S.C. § 1116 "put the Board on notice" of the existence of all NAS reports and their applicability to his claim. Appx4. He contended that all NAS reports are constructively before the board "in cases in which herbicide exposure has been conceded" because, pursuant to section 1116, the reports are prepared for and commissioned by VA and it would not be unduly burdensome for the board to consider the reports in these limited circumstances. Appx4-5. He further argued that *Update 2014* bears a direct relationship to his disability compensation claim for benign thyroid nodules because it demonstrates that "herbicides can affect the thyroid." Appx5.

**2. Constructive Possession**

The matter was referred to a panel to address Mr. Euzebio's constructive possession contentions. Appx5. The court found that, in order for the doctrine of constructive possession to apply, an "appellant must show that there is a *direct relationship* between the document and his or her claim to demonstrate that the document was constructively before the Board, even if the document was generated for and received by VA" pursuant to the Agent Orange Act of 1991,

Pub. L. No. 102-4, § 3, 105 Stat. 11, 13-15 (codified at 38 U.S.C. § 1116 note),[4] *i.e.*, a "document must bear a closer relationship to the appellant beyond providing general information related to the type of disability on appeal." Appx7-8 (emphasis in original).

The Veterans Court found that Mr. Euzebio did not submit *Update 2014* to the board or request the board to consider it. Appx8. The court also found that the agency "generally knew of the existence of the 2014 Update at the time of the Board decision," and the *Update* contained general information about the disability. Appx8. However, the court held that VA did not have constructive possession of the report in this case because there was no direct relationship to the claim and that the direct-relationship requirement was not satisfied simply because the report was obtained by VA pursuant to the Agent Orange Act. Appx8-9 (citing *Monzingo*, 26 Vet. App. at 102). The court stated:

> To hold otherwise would not only contravene our Court's case law but would undermine the Court's jurisdictional obligation to base its review on the record of proceedings before the Board, by allowing the Court to consider and find Board error based on any congressionally mandated reports submitted to VA in connection with its nationwide system for administering disability benefits, when the Board was not requested to and did not address such evidence.

[4] Section 3 of the Agent Orange Act required VA to contract with NAS to review and evaluate the available scientific evidence regarding associations between diseases and exposure to dioxin and other chemical compounds in herbicides.

Appx9.

**3. Section 1116 Does Not Require Consideration of NAS Reports**

The court stated that it was not inclined to address Mr. Euzebio's arguments raised for the first time in his reply brief and at oral argument that, because VA was previously required by statute to obtain and consider the NAS reports in creating presumptions of service connection, the updates should be before the board in all cases where herbicide exposure is conceded. Appx9. Nonetheless, the court stated that: (1) in *Monzingo*, the court declined to create a broad rule that the reports at issue were constructively before the board in every hearing loss or tinnitus claim; (2) Mr. Euzebio did not point to any language in section 1116 suggesting that Congress intended for VA to consider the reports in adjudicating individual claims; and (3) the board's decision referred to *Update 2014* only with reference to VA's general obligation to consider NAS reports in creating presumptions of service connection. Appx9-10.

**4. Duty to Assist**

The court found that the board's finding that Mr. Euzebio lacked the medical expertise to opine about a nexus between his disability and AO exposure was not an adequate reason for finding that the third element of *McLendon* was not satisfied. Appx13. However, the board also found that Mr. Euzebio's

conclusory generalized statements were insufficient to satisfy *Waters v. Shinseki*, 601 F.3d 1274, 1277-78 (Fed. Cir. 2010).

The court further found that, to the extent that the board erred in requiring competent evidence indicating that there may be an association between Mr. Euzebio's thyroid condition and exposure to AO, he did not demonstrate how the error was prejudicial because his lay allegations alone are not sufficient to satisfy *McLendon*. Appx14 (citing *Waters*, 601 F.3d at 1277-78). The court stated that, if the court accepted his argument, "it would essentially require VA to provide medical examinations 'routinely and virtually automatically' to all veterans that have been exposed to AO, regardless of the claimed disability and any known association to such exposure." Appx14. The court noted that Congress did not create an exception in 38 U.S.C. § 5103A(d) for veterans exposed to AO. Appx14.

**5. Dissenting Opinion**

In his dissenting opinion, Judge Allen first stated that the strength of the relationship between a particular disease and AO exposure found by the NAS is not relevant to whether *Update 2014* is constructively before the board. Appx18. Judge Allen would find that *Update 2014* has a direct relationship to Mr. Euzebio's claim and that, while 38 U.S.C. § 1116 did not require VA to consider the reports in individual adjudications, VA should consider the NAS

updates because "Congress made them" important for VA "expressly and unequivocally." Appx18-19. Judge Allen noted that the "Board is actually aware that the Updates exist and . . . knows" that the updates are meant to "provide scientific information about connections between [AO] exposure and certain medical conditions."[5] Appx19. He also pointed out that the board referred to the NAS report in its decision and that the Updates are available online. Appx20.

The Veterans Court entered judgment on September 13, 2019. Appx22. Mr. Euzebio filed a notice of appeal on September 19, 2019. Appx23.

## SUMMARY OF THE ARGUMENT

The Veterans Court committed no error in rejecting the various theories raised by Mr. Euzebio, some timely, others not, in support of his attempt to introduce before the Veterans Court an extra-record document into the appeal. The Veterans Court properly found that "the record of proceedings" in 38 U.S.C. § 7252(b) did not include *Update 2014*. The plain language of the Veterans Court's jurisdictional statute establishes that "the record" refers to evidence that was before the Secretary and the board and to a unitary body of documents

[5] The dissent pointed out that the *PurpleBook*, a Board publication, contains procedures to ensure that NAS updates are considered in appropriate benefits claims. Appx20. However, the majority found that it did not have jurisdiction to rely upon documents such as the *PurpleBook* and a November 2017 VA press release that post-date the board's decision. Appx8 n.3.

compiled for purposes of VA adjudication that is presented to the court for purposes of judicial appeal. *Update 2014* does not meet that definition.

Nor was the Veterans Court required to take official notice of *Update 2014*. The official-notice doctrine is committed to the agency's discretion, and the board did not abuse that discretion by not taking official notice of *Update 2014* because it does not address the disability that is the basis of Mr. Euzebio's claim.

The constructive possession doctrine is not for application here. The clear meaning of section 7252(b) of Title 38 is that "the record of proceedings before the Secretary and Board" does not include documents that were not before VA adjudicators but which the Veterans Court, in hindsight, believes could or should have been included in that record. Application of the doctrine is also inconsistent with the Veterans Court's established scope of review under section 7261(a)(3)(A) of board decisions denying entitlement to a VA examination or opinion pursuant to 38 U.S.C. § 5103A(d), as well as decisions of this Court.

Nevertheless, assuming that the doctrine is consistent with sections 7252(b) and 7261, constructive possession of a non-record document requires a direct relationship to the claim on appeal, which was the standard applied by the Veterans Court. The direct-relationship standard is equivalent to a relevancy standard and is consistent with VA's duty to assist by obtaining relevant records.

Here, the Veterans Court found that the document at issue did not meet this standard, a finding that is not reviewable by this Court.

Mr. Euzebio is not without a remedy, however. Although we make no representation as to whether the newly identified NAS report would be determined to be new and material evidence by the regional office if timely presented (new and material evidence filed during the appeal period will be considered submitted at the time of the claim, 38 C.F.R. § 3.156(b)), Mr. Euzebio is free to pursue that route, which is consistent with the statutory procedures adopted by Congress for addressing newly discovered evidence. See 38 U.S.C. § 5108.

## ARGUMENT

### I. Jurisdiction and Standard of Review

Pursuant to 38 U.S.C. § 7292(a), this Court has jurisdiction to review a Veterans Court's decision with respect to the validity of a decision on a rule of law or to the validity or interpretation of any statute or regulation relied on by that court in making that decision. This Court has jurisdiction to "decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). In reviewing a Veterans Court decision, this Court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(d)(1).

However, section 7292(d)(2) of title 38, United States Code, provides that, except to the extent that an appeal from a Veterans Court decision presents a constitutional issue, this Court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case."

This Court has consistently applied section 7292 strictly to bar fact-based appeals of Veterans Court decisions. *See*, *e.g.*, *Conway v. Principi*, 353 F.3d 1369, 1372 (Fed. Cir. 2004) (noting that the Federal Circuit reviews only questions of law and cannot review any application of law to fact); *see also Madden v. Gober*, 125 F.3d 1477, 1480 (Fed. Cir. 1997). The Court reviews questions of statutory and regulatory interpretation *de novo*. *See Smith v. Brown*, 35 F.3d 1516, 1517 (Fed. Cir. 1994).

## II. ***Update 2014*** **Was Not Part Of The "Record" Before the Board**

This case involves what to do when a claimant discovers "new evidence" following the final denial of his claim by the board. Rather than follow the long-standing framework for newly discovered evidence provided in the VA claims process, 38 C.F.R. § 3.156, and specifically adopted by Congress through its enactment of 38 U.S.C. § 5108, Mr. Euzebio appealed to the Veterans Court in an attempt to have that court consider a newly discovered document in the first instance.

The Veterans Court, like this Court, is an appellate body. It reviews decisions based upon the record below and the same statutory scheme that limits this Court and the Veterans Court to record review provides the aforementioned mechanism for how a claimant should address newly discovered evidence. Recent rulemaking, moreover, even eliminates any argument that submitting newly discovered evidence after a final board decision, but before expiration of the appeal period, as is the case here, deprives the claimant of any potential effective date benefits. 38 C.F.R. § 3.156(a) (2019); 84 Fed. Reg. 138 (Jan. 18, 2019). The path to resolve the situation Mr. Euzebio finds himself in has been established by Congress and the Secretary. There is no need for a constructive possession doctrine here.

Although the Veterans Court was not presented with the potential remedy of new and material evidence, the court ultimately reached the correct result in this case. The court properly rejected certain arguments raised by Mr. Euzebio, and the one error committed, application of the constructive possession doctrine, was offset in this case by the imposition of a direct relationship requirement. Accordingly, the decision should be affirmed, although for grounds different than those relied upon by the Veterans Court – the constructive possession doctrine does not apply.

### A. The Veterans Court Did Not Have Jurisdiction To Consider *Update 2014* Pursuant to 38 U.S.C. § 7252

"Courts created by statute can have no jurisdiction but such as the statute confers." *Christianson v. Indus. Operating Corp*. 486 U.S. 800, 818 (1988) (quoting *Sheldon v. Sill*, 49 U.S. 441 (1850)). The Supreme Court has held subject matter jurisdiction "can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012); *see also Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court."). In fact, "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). A court must "construe jurisdictional statutes narrowly and 'with precision and with fidelity to the terms by which Congress has expressed its wishes.'"[6] *Bailey v. West* 160 F.3d 1360, 1363 (Fed. Cir. 1998) (quoting *Cheng Fan Kwok v. Immigration & Naturalization Serv.*, 392 U.S. 206, 212 (1968)).

[6] Amicus National Law School Veterans Clinic Consortium (NLSVCC) argues that if this Court finds any ambiguity in 38 U.S.C. § 7252(b), the statute should be interpreted "broadly in favor of veterans." NLSVCC Br. at 12-13. However, this Court has stated that ambiguities regarding jurisdiction should be "resolved *against* the assumption of jurisdiction." *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1373 (Fed. Cir. 1994) (emphasis added).

Claims for veterans' benefits are initially developed and adjudicated by a regional office. 38 U.S.C. § 7105(b)(1) and (d)(1) (2018).[7] Regional office decisions are then reviewed on appeal by the board. 38 U.S.C. § 7104(a) and (b). The Veterans Court's jurisdiction to review decisions of the board is established by 38 U.S.C. § 7252(a). However, 38 U.S.C. § 7252(b) "limits" the court's review to "the record of proceedings before the Secretary and the Board." *Henderson*, 562 U.S. at 439. Thus, the Veterans Court exceeds this "jurisdictional requirement" if it considers evidence that is not in the record before the board when reviewing a board decision. *Kyhn v. Shinseki*, 716 F.3d 572, 576 (Fed. Cir. 2013).

When a statute is at issue, we begin with the statutory language. *Williams v. Taylor*, 529 U.S. 420, 431 (2000); *Myore v. Nicholson*, 489 F.3d 1207, 1211 (Fed. Cir. 2007). The statute's plain meaning is derived from its text and its structure. *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001); *Norfolk Dredging Co. v. United States*, 375 F.3d 1106, 1110 (Fed. Cir. 2004).

[7] Section 7105 was also amended by Pub. L. No. 115-55, § 2(q), 131 Stat. 1105, 1111, which is generally applicable to appeals arising from claims initially decided on or after February 19, 2019. *Id.*, § 2(x), 131 Stat. at 1115; 38 C.F.R. §§ 3.2400(b) and 19.2(a) and (c) (2019). Therefore, amended section 7105 is not applicable to this appeal.

The term "record of proceedings" is not defined in title 38, United States Code; however, *Black's Law Dictionary* (11th ed. 2019), defines "record" as the "official report of the proceedings in a case, including the filed papers, a verbatim transcript of the trial or hearing (if any), and tangible exhibits." Moreover, given that the Veterans Court has appellate jurisdiction over board decisions, 38 U.S.C. § 7252(a), the term "record of proceedings" in section 7252(b) is clearly synonymous with "record on appeal," which is defined by *Black's Law Dictionary* as the "record of a trial-court proceeding as presented to the appellate court for review." In *Kyhn*, this Court held that affidavits from VA employees compiled and submitted by the Secretary to the Veterans Court in compliance with an order of the Veterans Court were not part of the record before the board. 716 F.3d at 576. In the instant case, there is no dispute that Mr. Euzebio did not submit *Update 2014* to the board or request that the board consider it. Appx8. Therefore, based upon the plain language of section 7252(b), *Update 2014* was not in the "record of proceedings before the Board and the Secretary," and as a result, the Veterans Court did not have jurisdiction to consider it.

In addition, the plain language of section 7252(b) indicates that it refers to a single "record." The use of the singular term "record" preceded by the definite article "the" makes clear Congress' understanding and intent that "the record before the Secretary and the Board" would be a single record. *See Shum v. Intel*

*Corp*., 629 F.3d 1360, 1367 (Fed. Cir. 2010) (use of definite article "the" before "prevailing party" was evidence that statute referred to a single, specific party). In the context of the VA multi-tiered adjudication system, the concept of a unitary "record" of proceedings is well established and comports with the plain language of section 7252(b). *See Disabled Am. Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339, 1349 (Fed. Cir. 2003). In contrast, construing "the record" before the Secretary and the board to include, not only the record actually before those adjudicators, but additional documents separate from the adjudicative proceedings, is a strained reading of the statute and wholly anomalous as a matter of adjudicative process.

Amicus' argument to the contrary is incorrect on its face. Amicus argues that Congress' reference to both the Secretary and the board in section 7252(b) indicates that Congress meant to distinguish the two, which "suggests a broader record than just the actual file in possession of the Board." NVLSP Br. At 4. But Amicus quotes only a portion of the relevant phrase, pointing to "Secretary *and* the Board." *Id*. The entire relevant statutory phrase is: "the record of proceedings before the Secretary and the Board[.]" 38 U.S.C. § 7252(b). The most reasonable way of reconciling the fact that the statutory language explicitly refers to one record with its reference to both "the Secretary and the Board" is not by concluding that the record is amorphous and expansive, as Mr. Euzebio and Amici

suggest, but by reference to the structure of the VA claims system: "the Secretary" in this context refers to VA adjudicators, *i.e.*, the regional offices, and "the Board" to the Board of Veterans Appeals. The two levels of agency review consider the same record, adding to it as appropriate as they adjudicate the case.

The statutory scheme consistently refers to a single specific record forming the basis for review by both the regional offices and the board. The regional office must consider "all information and lay and medical evidence of record in a case before the Secretary," and the board's review is based upon "the entire record" developed in connection with the Secretary's initial decision. 38 U.S.C. §§ 5107(b) and 7104(a). Viewed in the light of this logical scheme, it is clear that section 7252(b) does not contemplate a "record before the Secretary and Board" that is separate and apart from the record established in connection with, and for purposes of, review by the Veterans Court. The record before the board is the same as the record before the Secretary, except to the extent additional documents, such as appellate hearing transcripts, are added to the record during an appeal and that singular record is the one presented to the Veterans Court for review on appeal. Thus, *Update 2014* was not part of the "record of proceedings" established in connection with, and for purposes of, VA's two-tiered adjudicative scheme. Appx9.

### B. The Board Was Not Required To Take Official Notice of *Update 2014*

Despite the fact that Mr. Euzebio did not submit *Update 2014* to the board or request that the board consider the report, he first contends that the board was nonetheless obligated to take official notice of *Update 2014*. Appellant's Brief (App. Br.) at 8-10. Relying upon 38 U.S.C. § 5107(b), which requires the Secretary to consider "all information and lay and medical evidence of record in a case before the Secretary," and 38 U.S.C. § 7104(a), [8] which provides that board decisions must be based on the "entire record in the proceeding" and "all evidence and material of record," Mr. Euzebio suggests that the board should have taken official notice of the NAS report. App. Br. at 8-11.[10]

[8] Section 7104 was amended by the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 2(p) and (w)(2), 131 Stat. 1105, 1111, 1114, which is generally applicable to appeals arising from claims initially decided on or after February 19, 2019. *Id.*, § 2(x), 131 Stat. at 1115; 38 C.F.R. §§ 3.2400(b) and 19.2(a) and (c) (2019). Therefore, the amended statute is not applicable to this appeal.

[10] Mr. Euzebio did not raise this argument before the Veterans Court; he instead argued that VA had constructive possession of *Update 2014*. Appx3-5. Thus, this Court need not consider this argument. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Boggs v. West*, 188 F.3d 1335, 1337-38 (Fed. Cir. 1999). However, much of the discussion responsive to this argument also counsels against imposition of the constructive possession doctrine, particularly as applied to NAS reports.

**1. Doctrine of Official Notice**

The doctrine of official notice allows adjudicators to take notice of commonly acknowledged facts and technical or scientific facts that are within the agency's area of expertise. *McLeod v. Immigration & Naturalization Serv.*, 802 F.2d 89, 93 n.4 (3d Cir.1986). Contrary to Mr. Euzebio's argument, an administrative agency is not required to take notice of such facts; rather, the doctrine of official notice is committed to the "broad discretion of the agency." *Rivera-Cruz v. Immigration & Naturalization Serv.*, 948 F.2d 962, 966 (5th Cir. 1991).

Mr. Euzebio relies upon *Banks v. Schweiker*, 654 F.2d 637 (9th Cir. 1981), to support his argument that the board was obligated to take official notice of the NAS report. App. Br. at 10. In *Banks*, the Ninth Circuit stated that an administrative law judge (ALJ) should take notice of adjudicative facts, whenever, "the ALJ . . . knows of information that will be useful in making the decision." *Id.* at 641 (quoting 3 K. Davis, *Administrative Law Treatise* § 15:18, at 200 (2d ed. 1980)). However, the question before the court in *Banks* was whether the ALJ acted properly in taking official notice of Social Security district office customs and practices, and the court found that the ALJ had acted properly. *Id.* The court did not address an adjudicator not taking official notice. *Banks* does not aid Mr. Euzebio.

In addition, the "facts" of which the board would have been required to take official notice in Mr. Euzebio's case are that there is inadequate or insufficient evidence to determine an association between exposure to "chemicals of interest" and disruption of endocrine function (other than hypothyroidism). *Update 2014* at 842.[11] Mr. Euzebio's claim is for benign thyroid nodules; he has not been diagnosed with hypothyroidism. Appx8. Therefore, the board did not abuse its discretion by not taking official notice of a NAS report that does not establish a link between Agent Orange exposure and a different disability involving the thyroid.

While an administrative agency may take official notice of "legislative facts," *i.e.*, general facts that help an agency "decide questions of law and policy and discretion," administrative facts that "answer the questions of who did what, where, when, how, why, with what motive or intent" are not the kind of facts of which an agency may take official notice. *Gebremichael v. Immigration & Naturalization Serv.*, 10 F.3d 28, 37 n.25 (1st Cir. 1993) (quoting 3 Kenneth C. Davis & John P. Wilson, *Administrative Law Treatise* § 12.3, at 413 (2d ed. 1980)); *Lucienne Yvette Civ. v. Immigration & Naturalization Serv.*, 140 F.3d 52, 66 (1st Cir. 1998) (Bownes, J., dissenting); *Dayco Corp. v. Federal Trade*

[11] See *Update 2014* at: *https://www.nap.edu/download/21845#*

*Comm'n*, 362 F.2d 180, 186 (6th Cir. 1966). To the extent that Mr. Euzebio argues that the board should have taken official notice of a potential connection between his benign thyroid nodules and hypothyroidism, Appx8, n.4, the doctrine of official notice would not be applicable as this is an "adjudicative fact" which relates to, and is determinative of, Mr. Euzebio's entitlement to a VA examination or opinion.

**2. Duty to Sympathetically Read**

Mr. Euzebio also argues that VA is required to sympathetically read the record and develop a claim and that VA's failure to consider *Update 2014* is inconsistent with the non-adversarial system of veterans' benefits. App. Br. at 12. This Court has stated that, "where the claimant has raised an issue of service connection, the evidence in the record must be reviewed to determine the scope of that claim." *Robinson v. Shinseki*, 557 F.3d 1355, 1361 (Fed. Cir. 2009). While VA clearly has an obligation to broadly and liberally construe the scope of the veteran's claim, and adjudicate entitlement to all benefits reasonably raised by the evidence of record, the case law also recognizes that "claims which have no support in the record need not be considered by the Board." *Id*. at 1367. As explained above, *Update 2014* was not part of the "record" of evidence before the board.

Moreover, Mr. Euzebio filed a claim for *benign thyroid nodules*, and there is no diagnosis in the record of thyroid cancer or hypothyroidism, the conditions which are addressed in *Update 2014*. On its face, VA's duty to sympathetically construe the scope of the claim does not extend to evaluating evidence pertaining generally to one condition as a necessary component of adjudicating the question of individual medical nexus for *a separate condition*, at minimum absent some basis to conclude this might be a remotely fruitful inquiry. But there is no readily apparent basis to conclude that generalized, aggregate evidence pertaining to one condition informs the specific etiology for a different condition, and Mr. Euzebio does not supply one.

**3. The Purpose of NAS Reports – Creating Presumptions**

In further support of his official notice contention, Mr. Euzebio disputes the Veterans Court's finding that 38 U.S.C. § 1116 does not support his argument that NAS reports were intended to be used in adjudicating individual claims. App. Br. at 14-15; Appx9-10; *contra* App. Br. at 20 (referring to "[t]he fact that § 1116 was not passed for the purpose of 'adjudicating individual claims'"). Mr. Euzebio relies upon 38 C.F.R. §§ 1.17(f) and 3.311a, which were promulgated to implement the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (38 U.S.C. § 1154 note) (Dioxin Act). App. Br. at 14. Mr. Euzebio's argument is inconsistent with the plain

language of the Dioxin Act, its implementing regulations, and 38 U.S.C. § 1116, which required VA to use NAS reports when determining what diseases should be presumed to result from AO exposure. None of these provisions required consideration of NAS reports when adjudicating individual claims.

**a. Statutory and Regulatory Provisions**

The Dioxin Act required VA to establish guidelines to: (1) decide claims based upon diseases related to herbicide exposure containing dioxin and (2) evaluate findings of scientific studies relating to the health effects of exposure to such herbicides.[12] Pub. L. No. 98-542, § 5(a) and (b)(1)(A), 98 Stat. at 2727. The Act required VA to make these evaluations after receiving the advice of the Scientific Council of the Veteran's Advisory Committee on Environmental Hazards. *Id.*, § 5(b)(1)(B), 98 Stat. 2727-28. Section 5(c)(1)(C) stated that the regulations "shall include provisions governing the use in the adjudication of individual claims of [VA's] evaluations" of the scientific studies. *Id.*, 98 Stat. 2728 (emphasis added).

In 1985, VA promulgated 38 C.F.R. § 1.17 to "provide[] a formal process for the Agency's evaluations of scientific and medical studies relating to the

[12] In its consideration of this evidence, the Dioxin Act requires VA's evaluation of scientific studies to "take into account whether the results are statistically significant, are capable of replication, and withstand peer review." *Id.*, § 5(b)(1)(A), 98 Stat. at 2727.

possible adverse health effects of dioxin or radiation exposure." 50 Fed. Reg. 15,848 (Apr. 22, 1985). Paragraph (f) of section 1.17 stated that, "[i]n the adjudication of individual claims, due consideration shall be given to the evaluations of study findings published pursuant to § 1.17." (Emphasis added). The regulation was rescinded on October 2, 1989, when VA amended section 1.17 to implement *Nehmer v. U.S. Veterans Admin.*, 712 F. Supp. 1404 (N.D. Cal. 1989), holding that VA applied too stringent a standard for determining which diseases to include in its regulations promulgated under the Dioxin Act. 54 Fed. Reg. 40,388 (Oct. 2, 1989); 54 Fed. Reg. 30,009 (Jul, 18, 1989).

VA carried out the statute and regulation by publishing in the Federal Register the Department's evaluations of scientific and medical studies relating to the adverse health effects of exposure to dioxin which were reviewed by the Veterans' Advisory Committee. *E.g.*, 52 Fed. Reg. 7513 (Mar. 11, 1987); 53 Fed. Reg. 39,709 (Oct. 11, 1988). Consistent with the Dioxin Act, VA evaluated the studies' findings based upon whether the findings are statistically significant and replicable, have withstood peer review, and are applicable to the veteran population of interest and whether the studies' methodologies has been sufficiently described to permit replication. 38 C.F.R. § 1.17(b).

VA considered the "evaluations" of the study findings in individual cases by concurrently promulgating 38 C.F.R. § 3.311a which provided guidelines and

criteria for resolving claims based on exposure to dioxin during military service in Vietnam based on sound scientific and medical evidence. 50 Fed. Reg. 15,848 (Apr. 22, 1985); 50 Fed. Reg. 34,452 (Aug. 26, 1985). The VA evaluated the available scientific and medical evidence for three conditions specified in the statute and promulgated a presumption of service connection for chloracne. *Id*. Section 3.311a(f) stated that, "[i]n the adjudication of individual claims, due consideration shall be given to the evaluations of study findings published pursuant to § 1.17 of this title." VA removed 38 C.F.R. § 3.311a when it promulgated 38 C.F.R. §§ 3.307(a)(6) and 3.309(e) to implement the Agent Orange Act of 1991. 59 Fed. Reg. 5106 (Feb. 3, 1994).

The plain language of the Dioxin Act and VA's implementing regulations required VA to consider the Department's "evaluation" of the scientific studies in the adjudication of individual claims, not the scientific studies themselves. The statute and regulations instead contemplated that the Department's evaluation of the medical and scientific studies would be reflected in regulatory presumptions of service connection applicable to individual claims. Thus, the statute and regulations do not support Mr. Euzebio's argument that adjudicators should consider the individual studies in deciding claims.

Congress then enacted the Agent Orange Act of 1991, § 3(a), 105 Stat. 13 (38 U.S.C. § 1116, note), which required VA to contract with NAS, "an

independent nonprofit scientific organization with appropriate expertise which is not part of the Federal Government, to review and evaluate the available scientific evidence regarding associations between diseases and exposure to dioxin and other chemical compounds in herbicides." Congress directed NAS to review, summarize, and assess the strength of evidence concerning the association between exposure to herbicides used in Vietnam and each disease suspected to be associated with such exposure. Pub. L. No. 102-4, § 3(c), 105 Stat. 13. Following receipt of a NAS report, the Secretary must determine, for each of the diseases involved, whether there was a "positive association" between exposure of people to a herbicide agent and the existence of the disease, *i.e.*, whether the "credible evidence" for the association equals or outweighs the credible evidence against it. *Id.*, § 2(a), 105 Stat. 11-12 (codified at 38 U.S.C. § 1116(a)(1)(B) and (b)). If the Secretary finds a credible association for a particular disease, VA must establish a presumption of service connection for it. *Id.*

As Mr. Euzebio acknowledges, the Agent Orange Act did not include a provision similar to section 5(b)(1)(C) of the Dioxin Act, App. Br. at 14, and there is no indication in the Agent Orange Act or current 38 U.S.C. § 1116 that Congress intended that adjudicators consider the NAS reports in adjudicating individual claims. Rather, the purpose of the NAS reports is to enable the

Secretary to make a determination about presumptions of service connection to be reflected in regulations. 38 U.S.C. § 1116(b)(2). As this Court stated:

> The statutory scheme contemplates that the [NAS] findings on these medical and scientific issues reflected in [its] Report would be the key element in the Secretary's decision [about whether to promulgate presumptions of service connection]. Congress necessarily intended that the Secretary, although not bound by the [NAS] findings, would place great reliance on them.

*Lefevre v. Secretary, Dep't of Veterans Affairs*, 63 F.3d 1191, 1199 (Fed. Cir. 1995). This Court should therefore reject Mr. Euzebio's argument that NAS reports were intended to be used in adjudicating individual claims.

**b. Functional Role and Practical Considerations**

Beyond the legal framework, it is crucial to understand the function the NAS reports actually perform, and the role they might reasonably perform as evidence. NAS reports are for policymaking. Accordingly, they examine the evidence on a broad scale. "To determine whether there is a scientifically relevant association between exposure and a health outcome, epidemiologists estimate the magnitude of an appropriate measure . . . that describes the relationship between exposure and disease in a defined population or group." *Update 2014* at 5. Essentially, the report is reviewing all available studies to determine what conclusions might be drawn about the effects of AO exposure *in the aggregate*.[13]

[13] In general, the other NAS reports on AO as well as those examining other topics

*Update 2014* at 6-7. Such evidence is obviously useful in the evaluation of whether a nationwide presumption is appropriate, but it does not follow that evidence drawn from the aggregate can meaningfully inform causation in a specific case. The NAS report itself notes that this renders its conclusions inapposite to evaluating causation for a particular individual's health problems. "The conclusions [in the report] are related to the associations between exposure and outcomes in in human populations, not to the likelihood that any individual's health problem is associated with or caused by the herbicides in question." *Update 2014* at 13.

Specific to this case, the evidence category to which *Update 2014* added hypothyroidism comes up far short of conveying a precise quantum of evidence. The "Limited or Suggestive Evidence of an Association" category "suggests an association" but necessarily includes the presence of "chance, bias, and confounding" in the underlying data. *Update 2014* at 8. Again, this rough characterization of the overall evidence is useful when determining whether a broad presumption is called for, but it is of no immediately apparent value in assessing the cause of an individual person's condition.

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all function similarly.

Given that Congress did not intend the NAS reports to be utilized in individual claims, it is unsurprising that they are structured this way. Requiring them to be discussed or to be the basis of an exam in all individual claims for a condition that has been evaluated in a NAS report would therefore put VA adjudicators and examiners in an extremely challenging position, to say nothing of a condition, like here, that is not referenced in the report. Adjudicators would be asked to evaluate and draw a conclusion on the impact that this aggregate characterization of evidence has on an individual case. The tension is inherent in the inquiry. The likely result will be added complexity and friction throughout the claim system, with little if any increase in benefits flowing to veterans.

Beyond the specific features of the NAS reports, the idea that any document that might be associated with the VA that contains scientific or medical knowledge should be the subject of regional office and board consideration in decisions *en masse* is a potential pandora's box. Whether through the official notice doctrine, or through some variation on the fiction that a given document was or should have been a part of the record, the outcome would unnecessarily overburden the system. The fact that many of the NAS reports were required by statute bears no principled relationship to requiring their use in individual claims, so there is no readily apparent reason why the exercise would end with NAS reports. Most obviously, medical dictionaries, clinician training manuals, and

medical treatises would all seem to be prime candidates for required discussion by VA and the board as a matter of course. This is a path best avoided.

### C. The Constructive Possession Doctrine Is Contrary To The Plain Meaning Of 38 U.S.C. § 7252(b)

Mr. Euzebio contends that the Veterans Court misinterpreted 38 U.S.C. § 7252(b) to find that the board did not have constructive possession of *Update 2014* because the report was not directly related to his claim. App. Br. at 16-17. He challenges the Veterans Court's requirement that the doctrine does not apply unless there is a "direct relationship" between a document and the claim on appeal and argues that the court should instead use a relevance standard. App. Br. at 18-21.

The doctrine of constructive possession as applied to the operation of the veterans' benefits system was first formulated by the Veterans Court in *Bell v. Derwinski*, 2 Vet. App. 611, 613 (1992) (per curiam order), in which the court held that, "where the documents . . . are within the Secretary's control and could reasonably be expected to be a part of the 'record before the Secretary and the Board,' such documents are, in contemplation of law before the Secretary and the Board and should be included in the record."[14] (Quoting 38 U.S.C. § 7252(b));

[14] In *Bell*, the court held that the Board had constructive possession of a VA Form 119 Report of Contact completed by a VA physician, letter from a VA physician, letter from VA to the appellant, and appellant's Statement in Support of

*see Disabled Am. Veterans v. Gober,* 234 F.3d 682, 695-96 n.6 (Fed. Cir. 2000) (*Bell* applies to documents that "could reasonably be expected to be part of the record"). The Veterans Court subsequently held that a document is constructively before the board only if it has a "direct relationship to the claimant's appeal" even if the document was generated for and received by VA under a statutory mandate. *See Monzingo*, 26 Vet. App. at 101-03.

The constructive possession doctrine is contrary to the clear meaning of 38 U.S.C. § 7252(b) because it construes "the record of proceedings before the Secretary and Board" to include documents that were not before VA adjudicators but which the Veterans Court, in hindsight, believes could or should have been included in that record.[15] It is also contrary to logic and the weight of precedent in other courts. Several Federal courts had held prior to *Bell* that a particular office of VA cannot be held to have constructive knowledge of evidence in the

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Claim. *Id*. at 613.

[15] The question of whether the constructive possession doctrine is even for application was not presented to the Veterans Court. Nevertheless, this Court may consider it here. *Glaxo Grp. Ltd. v. TorPharm, Inc.*, 153 F.3rd 1366, 1371 (Fed. Cir. 1998) ("If the grounds urged in support of the judgment have not been presented to and passed upon by the trial court, an appellate court may prefer not to address them in the first instance. *See Fireman's Fund,* 909 F.2d [495,] 499 [Fed. Cir. 1990] (citing *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 38–39, 109 S. Ct. 2782, 106 L.Ed.2d 26 (1989)). If, however, the ground urged is one of law, and that issue has been fully vetted by the parties on appeal, an appellate court may choose to decide the issue even if not passed on by the trial court.").

possession of a separate VA office. *See, e.g.*, *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982); *United States v. Willoughby*, 250 F.2d 524, 528-30 (9th Cir. 1957); *United States v. Nero*, 248 F.2d 16, 19-20 (2d Cir. 1957); *United States v. Kiefer*, 228 F.2d 448, 450-51 (D.C. Cir. 1955); *Clohesy v. United States*, 199 F.2d 475, 477-78 (7th Cir. 1952); *Jones v. United States*, 106 F.2d 888, 891 (5th Cir. 1939). This principle has been applied to other Federal agencies as well. *See Wyler v. Korean Air Lines Co.*, 928 F.2d 1167, 1172 (D.C. Cir. 1991) ("even within FAA, imputation of knowledge between different agency operations may not be justified"); *United States, Small Bus. Admin. v. Bridges*, 894 F.2d 108, 113 (5th Cir. 1990) ("Even within an individual agency, given the formidable infrastructure of many . . . government entities, automatic imputation of notice or actual knowledge from one branch office to another is seldom a viable concept.").

The Veterans Court cited no statutory basis for the *Bell* holding and instead wrote that "[t]he court cannot accept the Board being 'unaware' of certain evidence, especially when such evidence is in the possession of the VA, and the Board is on notice as to its possible existence and relevance." 2 Vet. App. at 612 (quoting *Murincsak v. Derwinski*, 2 Vet. App. 363, 372-73 (1992)). That reasoning lacks any legal foundation. Rather, it plainly ignores the several

statutes informing the proper interpretation of the term "record" as used in section 7252(b) and examined above at pages 16-21.

The constructive possession doctrine is also inconsistent with the Veterans Court's scope of review of the matter at issue in the instant case. The Veterans Court reviews a board decision regarding entitlement to a VA examination or opinion to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as specified in 38 U.S.C. § 7261(a)(3)(A). Appx12; *McLendon*, 20 Vet. App. at 81. Moreover, 38 U.S.C. § 7261(c) makes clear that "[i]n no event shall findings of fact made by the Secretary or the Board . . . be subject to trial de novo by the [Veterans] Court." In applying the abuse of discretion standard, the focal point for judicial review should be the administrative record already in existence and presented to the Veterans Court. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

The purpose of limiting review to the record actually before the board is to guard against the Veterans Court using new evidence to "convert the 'arbitrary and capricious' standard into effectively de novo review" in contravention of section 7261(c). *Axiom Res. Mgt. v. United States*, 564 F.3d 1374, 1379 (Fed. Cir. 2009) *(*quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005)). Thus, this Court has stated that supplementation of

the record should be limited to cases in which "the omission of extra-record evidence precludes effective judicial review." *Id*. Otherwise, "[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.*, 470 U.S. at 744.

### D. **Assuming Arguendo That The Constructive Possession Doctrine Is For Application, A Direct Relationship Is Required**

Mr. Euzebio contends that the "'direct relationship' requirement for the constructive possession doctrine undermines the systemic and perceived fairness of VA's pro-claimant system." App. Br. at 18. He instead argues that, if a congressionally mandated report submitted to VA "is known to the Board and contains relevant facts," VA is required to consider it and the Veterans Court is responsible for ensuring that the board considers such a report. App. Br. at 18-19. Mr. Euzebio relies upon the Veterans Court's rules of procedure to support his argument that the NAS report was constructively part of the record before the board. App. Br. at 19. This argument is without merit.

### 1. Origin of the Direct Relationship Requirement

In its decision, the Veterans Court discussed the development of the "direct-relationship" standard, which has been developed by the court over time, as the court was confronted with arguments as for why particular documents that were not considered by the agency should have been considered. Appx6-7. Essentially, the standard reflects that documents not relate too tenuously to the appellant's claim to be considered in VA's constructive possession. Appx7. For example, in *Goodwin v. West*, 11 Vet. App. 494, 496 (1998) (per curiam), the court stated that, if a document relates to claims for VA benefits for an individual other than the appellant and was not submitted to VA with regard to the appellant's claim, the document "could not 'reasonably be expected to be a part of the record before the Secretary and the Board.'" *Goodwin* clarified that, even when a document is generated for and received by VA, "it will not be considered constructively before the Board in a particular claimant's case unless the document has a direct relationship to the claimant's appeal." *Monzingo*, 26 Vet. App. at 102.

In *Monzingo*, the court held that a report "supported by" a contract between NAS and VA was not specific to the appellant, stating that the only connection between the report and the claim was that the report generally discusses hearing loss as it relates to military service and the claim was for hearing loss allegedly incurred in military service. *Id.* at 103. The court also held that a report prepared

by the National Research Council bore no relationship to the claim other than its general discussion of the relationship between tinnitus and hearing loss. *Id*.

This standard is akin to requiring that the document must be relevant to the claim at issue. *Black's Law Dictionary* defines "relevant" as "[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." This Court has stated that, in order to be relevant, evidence must tend to prove or disprove a material fact. *AZ v. Shinseki*, 731 F.3d 1303, 1311 (2013) ("Evidence that does not tend to prove a fact that is of consequence to the action[] . . . is not relevant." 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 401.07 (2d ed. 2012)).

In the instant case, the Veterans Court stated that VA awareness of a report that contains "general information about the type of disability on appeal" does not trigger the constructive possession doctrine. Appx8. The court found that "the only connection between the report and the appellant is that it generally discusses whether a myriad of conditions may be related to AO and the appellant was exposed to AO." Appx10. The court noted that *Update 2014* discusses hypothyroidism, while Mr. Euzebio's claim is for benign thyroid nodules, and that Mr. Euzebio does not argue that these are the same conditions. Appx8 n.4. Rather he contended that the question of whether there is a sufficient relationship

between hypothyroidism and benign thyroid nodules is a medical question and that *2014 Update* "go[es] to the nexus question on the merits of [the] service-connection claim." Appx8 n.4. However, the Veterans Court's factual finding that *Update 2014* does not have a direct relationship to Mr. Euzebio's claim, *i.e.*, is not relevant, is not reviewable by this Court. *See* 38 U.S.C. § 7292(d)(2); *Golz v. Shinseki*, 590 F.3d 1317, 1322 (Fed. Cir. 2010).

**2. A Reduced Standard Is Unworkable**

What is reviewable is the standard itself. To impose a reduced standard that documents with a tenuous relationship with the claim be viewed as within the constructive possession of VA, as Mr. Euzebio suggests, would lead to an unworkable standard. Any scientific reports on diseases or injuries held by VA in any capacity being deemed constructively before the board in every case involving a claim arising from the disease or injury addressed in such reports, as the Veterans Court recognized, does not work. Appx9. This would place an impossible burden on the board and the Secretary. In addition, if Mr. Euzebio's position were adopted, every NAS report would be held to be part of the record in every case irrespective of whether the claimed disability is actually addressed in a report and VA would be required to evaluate the relationship of any claimed disability to any condition mentioned in a NAS report. If there is any limiting

principle in Mr. Euzebio's argument that can forestall such a result, he has yet to articulate it, and none is readily apparent.

Instead, Mr. Euzebio and amicus appear to agree that the standard should involve relevancy, but disagree with the Veterans Court's finding in this case that the *Update 2014* was not relevant. App. Br. at 6, 16; NVLSP Br. at 24. That argument simply challenges the unreviewable relevancy finding made by the Veterans Court in this case. 38 U.S.C. § 7292(d). Next, Mr. Euzebio examines various decisions of this Court involving the concept of an outcome determinative test, apparently to establish that a relevant document need not be outcome determinative. Appx16-18 (examining *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998) and *McGee v. Peake*, 511 F.3d 1352 (Fed. Cir. 2008)). But the Veterans Court did not impose an outcome determinative test here.

Amicus does attempt to supply a limiting principle, albeit an amorphous one: "[t]he touchstone . . . is reasonableness," *i.e.*, the board constructively possesses evidence when the board reasonably should be aware of its existence and relevance to the claim. NVLSP Br. at 24.[16] Again, this appears to be

[16] Immediately before making this argument, NVLSP lists a series of documents that VA either reviews or makes available to claimants that identify, for example, the military use of hazardous substances or the location of Navy vessels near Vietnam during the Vietnam era as evidence that VA uses documents like NAS reports in individual cases. NVLSP Br. at 20-23. This is not a valid comparison. These documents are akin to service records, often prepared by the Department of

semantics. Whether you use the label relevant or reasonable, any holding that such a standard is satisfied in this case would reduce that standard to no limit at all. There is no obvious reason why a report indicating there is limited or suggestive evidence that *hypothyroidism* is associated with AO exposure is relevant to a claim for *benign thyroid nodules*. Perhaps Amici and Mr. Euzebio believe the report was relevant on its face because both conditions concern the thyroid. And it is true that body system plays a role in defining the reasonable scope of a claim. *See Clemmons v. Shinseki*, 23 Vet. App. 1, 5 (2009); *see also*78 Fed. Reg. 65,490 (Oct. 31, 2013); 79 Fed. Reg. 57,660 (Sept. 25, 2014). But it is crucial to appreciate the distinction between the degree of specificity VA may require of a veteran in order for the veteran to initiate a claim stream for a given condition (which is the primary focus of *Clemmons* and the numerous cases that follow it), and the question of whether a given piece of evidence might *actually inform* the question of what medically caused a particular disability. It is the latter that is the issue in this case, not the former, and the latter is necessarily a narrower inquiry.

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Defense and designed to record historical facts for purposes of satisfying the place and time requirement for identifying "in-service" events. Indeed, these documents a more akin to 38 C.F.R. § 3.309 that identifies presumptive diseases than the studies that might lead to the inclusion of a disease in section 3.309.

### 3. The Direct Relationship Standard Is Not Inconsistent With Statute and Veterans Court Rules

The direct-relationship test is not inconsistent with the Veterans Court's procedural rules. App. Br. at 19. Mr. Euzebio relies upon Vet. App. R. 10(a)(1)-(2), which states that the "record before the agency" includes materials "contained in the claims file on the date the Board issued the decision" and "any other material from the record before the Secretary and the Board relevant to the Board decision on appeal."[17] App. Br. at 19. He also relies upon Vet. App. R. 28.1(a)(1)(C) which states that the "record of proceedings" must contain "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 issues otherwise raised in the appeal." App. Br. at 19. As explained above, "relevant" evidence is evidence that is "[l]ogically connected and tending to prove or disprove a matter in issue," and this standard is virtually identical to the "direct-relationship standard." *Black's Law Dictionary; AZ*, 731 F.3d at 1311. The Veterans Court

[17] The Veterans Court has cited its Rule 10(a) as consistent with *Bell* and the court's expansive interpretation of 38 U.S.C. § 7252. *Robinson v. McDonald*, 28 Vet. App. 178, 184-85 (2016). However, nothing in Rule 10(a) affirmatively supports the broad proposition that the "record of proceedings before the Secretary and the Board" may include documents that were not actually part of the record before VA adjudicators. Even if the rules did so, they would conflict with the plain meaning of section 7252, and under such circumstances, the statute clearly must prevail. *See* 28 U.S.C. § 2071(a).

found that Update 2014 "generally discusses a myriad of conditions [that] may be related to AO," to which Mr. Euzebio was exposed. Appx10. However, the report did not address the disability for which Mr. Euzebio seeks service connection, *i.e.*, it did not tend to prove a material fact of the claim. Appx8 n.4.

Finally, Mr. Euzebio argues that, pursuant to 38 U.S.C. § 7104(a), the board must consider "applicable provisions of law." App. Br. at 20. He therefore contends that, although 38 U.S.C. § 1116 was not enacted for the purpose of adjudicating individual claims, the NAS reports "might . . . indicate a link between an individual veteran's condition and herbicide exposure, and thus it is relevant to his or her claim." App. Br. at 20. However, as explained above, the Veterans Court found that *Update 2014* is not relevant to Mr. Euzebio's claim for benign thyroid nodules and this finding is not reviewable by this Court. Appx10; 38 U.S.C. § 7292(d)(2); *Golz*, 590 F.3d at 1322.

#### 4. The Direct-Relationship Test Is Not Inconsistent With VA's Duty To Obtain Relevant Records

Mr. Euzebio contends that the direct-relationship requirement impermissibly narrows VA's duty to assist under 38 U.S.C. § 5103A by requiring VA to obtain evidence only if it is outcome determinative rather than relevant to a claim. App. Br. at 21-23. Mr. Euzebio's argument is inconsistent with the statute and this Court's case law.

Congress has provided clear standards governing VA's duty to assist. Section 5103A(a)(1) provides that VA must make "reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim." *McGee*, 511 F.3d at 1357. Pursuant to subsections (b) and (c)(1)(A)-(C) of 5103A, VA has a duty to obtain: relevant private records that "the claimant adequately identifies to the Secretary;" a "claimant's service medical records;" "relevant records pertaining to the claimant's active military, naval, or air service" held or maintained by a governmental entity for which the claimant has provided sufficient information to locate the records; records of "relevant medical treatment or examination of the claimant" if the claimant furnishes information sufficient to locate those records; and "[a]ny other relevant records held by any Federal department or agency that the claimant adequately identifies and authorizes the Secretary to obtain." 38 U.S.C. § 5103A(b) and (c)(1)(A)-(C); 38 C.F.R. § 3.159(c).

This Court has stated that "[r]elevant records for the purpose of § 5103A are those records that relate to the injury for which the claimant is seeking benefits and have a reasonable possibility of helping to substantiate the veteran's claim." *Golz*, 590 F.3d at 1321 (emphasis added); *see Bailey v. Shinseki*, 527 Fed. App'x 937, 939 (Fed. Cir. 2013); *Hime v. Shinseki*, 439 Fed. App'x 835, 899 (Fed. Cir. 2011). In addition, the statute provides that VA must provide an examination or

opinion "if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence," contains competent evidence that the claimant has a current disability or persistent or recurrent symptoms of disability and indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service but does not contain sufficient medical evidence to make a decision on a claim.[18] 38 U.S.C. § 5103A(d)(2); *see McLendon*, 20 Vet. App. at 83 (38 U.S.C. § 5103A(d)(2)(B) requires only that the evidence indicate that there may be a nexus between the disability and the claimant's service).

*Black's Law Dictionary* defines the phrase "of record" as "[r]ecorded in the appropriate records." VA has established routine and detailed policies and procedures for storing records relating to claims for VA benefits in "claims folders." *See* Veterans Benefits Administration Adjudication Procedure Manual M21-1, Part III, subpart ii, Chapter 4 ("Files and Folder Control"). VA has designated these claims folders as its official system of records for records pertaining to claims for VA benefits, *i.e.*, "VA Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records—VA" (58VA21/22/28).

[18] While competent evidence demonstrating that there may be an indication of a nexus is not required, a claimant's "conclusory generalized" lay statements in the absence of evidence that a disability is related to service do not satisfy 38 U.S.C. § 5103A(d)(B). *Waters*, 601 F.3d at 1278-79.

77 Fed. Reg. 42,594 (Jul. 19, 2012). Thus, VA's claims folder ordinarily will constitute "the record of proceedings before the Secretary and the Board," and as explained above, *Update 2014* was not in Mr. Euzebio's claims file. Appx8.

Should VA fail to associate a relevant record with a veteran's claims file, the appropriate remedy would be remand for VA to comply with its general duty to provide assistance under 38 U.S.C. 5103A. Thus, although we contend that the constructive possession doctrine has no role here, to the extent that the Veterans Court determines remand is appropriate, it should only do so when the record at issue directly relates to the claim.

5. **Mr. Euzebio's Prejudicial Error Assertion**

Finally, Mr. Euzebio contends that the Veterans Court's use of an alleged erroneous standard for the constructive possession doctrine was prejudicial error. App. Br. at 24. If this Court determines that the Veterans Court should have used a lesser standard than the direct-relationship standard it used, or that the court should have taken official notice of *Update 2014*, a remand would be in order. However, if this Court finds no error in the Court's use of the direct-relationship standard and its rejection of the official notice argument, a prejudicial error analysis is not warranted, as there would be no error. Similarly, if the Court determines that the Veterans Court erred in considering the constructive

possession doctrine in the first place, there would be no error vis-à-vis Mr. Euzebio appropriate for a prejudicial error analysis.

## CONCLUSION

For the reasons explained, this Court should affirm the Veterans Court's decision.

Respectfully submitted,

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April 17, 2020

## CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 17th day of April, 2020, a copy of the foregoing Brief for Respondent-Appellee was filed electronically.

☑ This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/ Martin F. Hockey, Jr.

☐ A copy of this filing was served via:

- ☐ hand delivery
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- ☐ third-party commercial carrier for delivery within 3 days
- ☐ electronic means, with the written consent of the party being served

To the following address:

CERTIFICATION OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B), I certify that the forgoing brief contains 11,190 words, excluding the parts of the brief exempted by the rule. The brief complies with the typeface requirements and type style requirements of FRAP 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

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