No. 20-2067

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Joe A. Lynch

Claimant-Appellant,

v.

Robert L. Wilkie, Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals for
Veterans Claims in Case No. 19-3106

APPELLANT'S CORRECTED REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-2067

Short Case Caption Lynch v. Wilkie

Filing Party/Entity Joe A. Lynch

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Name: Mark R. Lippman

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Joe A. Lynch		

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ARGUMENT

I

WHILE PAYING LIP SERVICE TO THE MODIFIER *APPROXIMATE*, THE *ORTIZ* OPINION ACTUALLY RENDERED THE TERM SUPERFLUOUS BY SETTING FORTH A PREPONDERANCE-OF-THE-EVIDENCE STANDARD FOR THE AGENCY TO DISPROVE VA CLAIMS

In his opening brief, Mr. Lynch argued that, by equating *approximate* balance of the evidence with the equipoise-of-the-evidence-standard for veterans and the corresponding preponderance-of-the-evidence standard for the Agency, *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001) rendered this pivotal term superfluous. Appellant's Opening Brief (AOB) at 16-22.

The Secretary counters that "*Ortiz* created no such narrow standard," *i.e.,* the equipoise-of-the-evidence standard for claimants to prove their claims. Appellee's Responding Brief (RB) at 7. As the Secretary sees it, *Ortiz* gave full measure to the modifier *approximate* by citing synonymous phrases, such as nearly-equal or too-close-to-call:

> Having defined the terms relevant to the sole issue on appeal, the *Ortiz* Court reasoned that "if the Board is persuaded that the preponderant evidence weighs either

> for or against the veteran's claim, it necessarily has determined that the evidence is not 'nearly equal' or 'too close to call,' and the benefit of the doubt rule therefore has no application." 274 F.3d at 1365. Accordingly, it held that a "preponderance of the evidence" determination necessarily precludes a determination that the evidence is also in "approximate balance," such that the benefit of the doubt rule would not apply. *Id*. at 1366.

RB at 9; *see id*. at 11-12.

To be sure, *Ortiz* compared the modifier to analogous phrases. However, the problem with *Ortiz* is not so much with these semantical comparisons,[1] but with its adoption of the corresponding preponderance-of-the-evidence standard. In no uncertain terms, *Ortiz* held that claimants *necessarily* fail to satisfy their burden of proof – the approximate-balance-of-the-evidence standard – when the preponderance of the evidence weighs against their claim:

> [W]e conclude that a finding that evidence preponderates in one direction precludes a finding that the positive and negative evidence is in "approximate balance," and we therefore interpret the clear and unambiguous language of § 5107(b) and its accompanying regulation to have no application where the Board determines that the preponderance of the evidence weighs against the veteran's claim.

274 F.3d at 1366.

This conclusion cannot be right. A finding that the evidence preponderates for or against a claim, at most, precludes a finding that the evidence

[1] *But see* AOB at 22-23 (discussing the range of definitions of *approximate*).

is in even or perfect balance/equipose. But, the same finding does not, as *Ortiz* and the Secretary would have us believe, "preclude[] a finding that the positive and negative evidence is in 'approximate balance.'" *Id*; AB at 9. After all, the totality of the (persuasive)[2] evidence can both preponderate in one direction and be nearly or approximately in balance. Yet these two standards cannot co-exist; only one party may prevail. For this calculus to make any sense, the preponderance-of-the-evidence standard and the equality/equipoise-of the evidence standard must be viewed as reciprocal and mutually exclusive burdens of persuasion for the VA and claimants, respectively.

This reading of *Ortiz* and 38 U.S.C. § 5107(b) is consistent with *Skoczen v. Shinseki*, 564 F.3d 1319 (Fed. Cir. 2009). In *Skoczen*, the Federal Circuit interpreted the benefit-of-the-doubt rule as setting forth an absolute equality-of-the-evidence or equipoise-of-the-evidence standard:

> Under subsection (b), the claimant enjoys what is termed the "benefit of the doubt rule," or alternatively what may be thought of as an *"equality of the evidence"* standard (as opposed to the more common "preponderance of the evidence" standard applied in most civil contexts). That is, we can think of this standard as a "burden of persuasion," in that the evidence *must rise to a state of equipoise* for the claimant to "win."

[2] The Secretary emphasizes that, for purposes of the preponderance-of-the-evidence standard, evidence is evaluated for its qualitative or persuasive value. AB at 8-9. This is true, but the same qualitative evaluation applies to all burdens of persuasion.

Id. at 1324 (italics added); *id.* (citing *Ortiz*).

Thus, despite its gratuitous definition of *approximate* (*e.g.*, referring to the term as meaning nearly equal), *Ortiz*'s employment of the preponderance-of-the-evidence standard actually defines the claimant's burden of proof, setting forth the corresponding equality or equipoise-of-the-evidence standard for claimants to prove their claims. In other words, *Ortiz* pays lip service to the modifier *approximate*, but its construction of 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102 effectively renders the term superfluous.

II

ORTIZ ERRED BY CONCLUDING THAT THE TERM *APPROXIMATE* WAS UNAMBIGUOUS; AND THIS ERROR RESULTED IN THE COURT OVERLOOKING RELEVANT LEGISLATIVE AND REGULATORY HISTORY AND THE PRO-CLAIMANT CANON OF RESOLVING INTERPRETIVE DOUBT IN FAVOR OF CLAIMANTS

Ortiz summarily characterized the operative phrase "approximate balance" of Section 5107(b) as "clear and unambiguous language." 274 F.3d at 1366. But, as Mr. Lynch pointed out in his opening brief, *approximate* is an ambiguous term, having a range of potential meanings.[3] *Chickasaw Nation v.*

[3] AOB at 22-23.

United States, 534 U.S. 84, 90 (2001) (defining an "ambiguous" term as one "capable of being understood in two or more possible senses or ways").

For this reason, the *Ortiz* Court should have examined the relevant legislative and regulatory histories to ascertain Sections 5107(b) and 3.102 intended operation. *See Dick v. Office Pers. Mgmt*., 216 F.3d 1353, 1356 (Fed. Cir. 2000) ("Since the statute is ambiguous with respect to its application to this case, we have reviewed the legislative history of the amendment."); *Hoechst Aktiengesellschaft v. Quigg*, 917 F.2d 522, 526 (Fed. Cir. 1990) ("When faced with such ambiguity it is incumbent upon this court to examine the legislative history to discern Congress' intent.").

Significantly, the Secretary does not dispute the ambiguity of the word *approximate*. Yet, he fails to respond to Mr. Lynch's analysis of the relevant legislative and regulatory histories. AOB at 24-34. Given the breadth and centrality of this analysis, the Secretary's silence should be treated as an implicit concession of its correctness. *See generally Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (judicial system assumes counsel will provide sufficient analysis to assist in the decision-making process); *Macwhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) ("Where appellant has presented a legally plausible position in the form of a relevant, fair and reasonably comprehensive brief, with appropriate record references (a standard referenced, and the Secretary

has failed to respond appropriately, the Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded.") (citation and internal quotation marks omitted).

Beyond this, the Secretary ignores the pro-veteran canon resolving ambiguous provisions in favor of claimants.[4] AOB at 23. This rule should rank high among the canons of statutory construction, arguably just below the plain language rule. *See Procopio v. Wilkie*, 913 F.3d 1371, 1382-87 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring) (discussing the importance of the pro-veteran canon of construction); *Bo v. Wilkie*, 31 Vet.App. 321, 345 (2019) ("To interpret the statute otherwise would be to ignore the import of the pro-veteran canon of construction, an interpretative tool that has real meaning.") (citation omitted). After all, this tenet was born from the Nation's longstanding solicitous policy "to repay those whose service safeguards her very existence. Courts have traditionally read laws of this character liberally, with a view to spreading the boon broadly unless the legislature had manifested a desire to dole it out narrowly." *Thompson v. Clifford*, 408 F.2d 154, 158 (D.C. Cir. 1968); *id.* at 158 n.23 (listing the various veterans preferential programs); *Fishgold v. Sullivan Drydock &*

[4] The Secretary argues that the pro-veteran canon is inapplicable here because the benefit-of-the-doubt rule already lowers the evidentiary burden normally applied in civil litigation. AB at 21-22. The applicability of the canon, however, does not depend upon the standards used in other forums, but upon the ambiguity of the VA provision itself.

Repair Corp., 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.").

Needless to say, the pro-veteran canon is more than a typical remedial policy. Although a liberal interpretive approach applies to remedial statutes in general,[5] the pro-veteran canon enjoys a more elevated status, embedded in the very structure of the VA's uniquely paternalistic and non-adversarial system:

> The system for awarding veterans' benefits is "imbued with special beneficence" from a sovereign grateful to a "special class of citizens, those who risked harm to serve and defend their country." *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998). It is "supposed to be a nonadversarial, *ex parte*, paternalistic system," that is uniquely pro-claimant. *Collaro v. West*, 136 F.3d 1304, 1309 (Fed. Cir. 1998). Viewed in its entirety, the veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus. It is entirely inquisitorial in the regional offices and at the Board of Veterans' Appeals where facts are developed and reviewed. The purpose is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case.

Forshey v. Principi, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (en banc) (Mayer, C.J., dissenting); *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (holding that "[p]articularly in light of this [pro-veteran] canon," the 120-day deadline under 38 U.S.C. § 7266(a) is non-jurisdictional even though labeled a jurisdictional statute).

[5] *See Atchison, T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 561-62 (1987).

Thus, the term *approximate* should be given the most liberal of its common definitions.[6] *Surely v. Peake*, 551 F.3d 1351, 1357 (Fed. Cir. 2009) (giving the most favorable interpretation of an ambiguous VA statute).

III

STARE DECISIS SHOULD NOT BAR THE FEDERAL CIRCUIT *EN BANC* COURT FROM OVERTURNING *ORTIZ*, AS THAT THREE-JUDGE PANEL OPINION WAS CLEARLY WRONGLY DECIDED

In his opening brief, Mr. Lynch argued that *stare decisis* has less force where, as here, an *en banc* court is asked to overturn one of its three-judge panel decisions. AOB at 34-36. As the United States Court of Appeals for the District of Columbia recently explained, a *fundamentally flawed* standard for overturning precedent should apply to *en banc* review of circuit decisions, even though a more stringent standard applies to Supreme Court review of its own opinions:

> *Stare decisis* principles do not require us to continue down the wrong path. Because circuit courts play a different role in the federal system than the Supreme Court, *stare decisis* applies differently to circuit precedent than it does at the Supreme Court. In particular, as the dissenting opinion acknowledges, it is appropriate for the en banc court to set aside circuit precedent when, on reexamination of an earlier decision, it decides that the panel's holding on an important question of law was **fundamentally flawed**.

[6] *See* AOB at 22-23.

Allegheny Def. Project v. FERC, 964 F.3d 1, 18 (D.C. Cir. 2020) (citations and internal quotation marks omitted) (bold added); *Planned Parenthood Tex. Family Planning & Preventative Health Servs. v. Kauffman of Greate*r, 2020 U.S. App. LEXIS 36985 (5th Cir., November 23, 2020), slip op. at 43 ("That does not mean that principles underpinning the doctrine of stare decisis have no place in the en banc court's decision about whether to overturn or abrogate a panel's prior decision. But the analysis is not as exacting as that undertaken by the Supreme Court of the United States in applying the stare decisis doctrine, as it must, in deciding whether to overturn its own precedent."). The Secretary nonetheless ignores this distinction, insisting that the same standard of *stare decisis* extends to Supreme and *en banc* review. AB at 13, 16.

The Secretary further claims that three important factors cut in favor of *stare decisis*: 1) the strength of *Ortiz*'s doctrinal underpinnings, 2) its continued workability and 3) the absence of new experiences requiring a change in the law.[7] AB at 16. As for the first, *Ortiz* has remained good authority for the simple reason that no subsequent three-judge panel opinion could have overruled or undermined it. AOB at 39-40. Admittedly, the Supreme Court has this authority, but its review of VA cases has been limited.

[7] The Secretary essentially uses the same arguments under the second and third factors. *Compare* AB at 18-23 *with* AB at 24-27.

And the Secretary's argument in favor of corrective legislative action is likewise unpersuasive. The Secretary maintains that Congress "routinely enacts corrective legislation in direct response to judicial decisions." AB at 14. For this proposition, he cites only three examples, none involving overturning case authority and just one pertaining to VA disability benefits. *Id.* at 14-15. Tellingly, the Secretary fails to identify where Congress has enacted legislation for the specific purpose of overruling an individual VA disability opinion. At any rate, the Federal Circuit recently decided in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc) that it need not "place on the shoulders of Congress the burden of the Court's own error." *Id*. at 1380 n.7 (citation and internal quotation marks omitted).

The second factor, the continued workability of *Ortiz* (*i.e.*, the consistency and predictability of its application), arguably favors *stare decisis*, although the Secretary admits to some deviation in the use of *Ortiz*'s operative language. AB at 17. But the importance of this factor pales in comparison to the prejudicial effect of the holding. *Stare decisis* does not serve its proper purpose by upholding fundamentally flawed decisions which uniformly favor or prejudice a particular class of litigants. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) (noting that *Auer* deference is workable because it does not favor government agencies by incentivizing them to write vague regulations); *Ramos v. Louisiana*,

140 S. Ct. 1390, 1417-18 (2020) (Kavanagh, J., concurring) (pointing out that a reason for overruling the *Apodaca* holding, which allows for non-unanimous jury verdicts, is that it unfairly prejudices black defendants).

Ortiz fails on this score. *Ortiz*'s interpretation of Sections 5107(b) and 3.102 not only misreads the text and ignores the legislative and regulatory histories, it uniformly prejudices veterans in a system designed to be "unusually protective of claimants." *Henderson*, 562 U.S. at 437 (citation and internal quotation marks omitted). At heart, *Ortiz* contravenes the essential and abiding VA policy to apply the most liberal interpretation of the law[8] and "to resolve all issues by giving the claimant[s] the benefit of *any* reasonable doubt."[9] *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (overruling precedent to "correct a seriously erroneous interpretation of statutory language that would undermine congressional policy"); *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235, 241 (1970) (overruling precedent because it departed from consistent Congressional policy).

[8] 38 C.F.R. § 3.102 ("It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation…").

[9] H.R. Rep. No. 100-963, at 13 (1988) (Veterans' Judicial Review Act) (italics added).

This aside, the Secretary claims that Mr. Lynch's proposed interpretation lacks clarity, and thus would lead to inconsistency at the administrative level and confusion at the judicial level:

> Mr. Lynch's "higher than preponderance-of-the-evidence" standard for denying benefits claims also fails to clarify how much evidence is sufficient to reject a claim. His preferred statutory construction could create a rule where any evidence, regardless of its probative value, could satisfy this criterion and thus entitle any claimant to VA benefits. This would lead to greater inconsistency at the administrative level, and it would leave no clear guidance for reviewing courts on an appropriate standard of review.

AB at 22.

Mr. Lynch disagrees. His opening brief made clear that the relevant legislative and regulatory histories support a *clear* preponderance-of-the-evidence standard. AOB at 26, 28, 30-31. This benchmark provides sufficient guidance to VA adjudicators and reviewing courts alike, instructing: When there is credible evidence both for and against the claim (or issue), the benefit-of-the-doubt/reasonable doubt policy holds unless the evidence clearly or obviously weighs against the claim. *See* Appx78,72; AOB at 26, 28. Admittedly, this linguistic formulation "is not amenable to any mathematical formula," but neither is *Ortiz*'s simple preponderance-of-the-evidence standard. 274 F.3d at 1365.

The facts of the present case well illustrate the need for this standard, ensuring that the benefit-of-the-doubt/reasonable doubt rule will play an active role

in VA adjudication. *See* AOB at 33-34. Here, Mr. Lynch sought an increased evaluation for his service-connected PTSD in excess of a thirty (30) percent disability rating. In support of his claim, he submitted opinions of a private psychologist and a private psychiatrist, both supporting a rating greater than thirty percent. The VA, on the other hand, obtained adverse opinions from two of its psychologists. AOB at 5-10 (summarizing the medical evidence).

On this record, the Board denied the increased rating claim, reasoning that Mr. Lynch lacked some of the symptoms listed for the much higher ratings of seventy (70) percent (obsessional rituals, impairment in speech) and one hundred (100) percent (hallucinations, delusions, intermittent inability to perform activities of daily living ratings). Appx21.

This misguided evaluation of the evidence, the Veterans Court held, constituted error:

> [T]he Court concludes that the Board erred in its treatment of the evidence showing that the appellant had some symptoms indicative of a higher rating, including suicidal ideation, hypervigilance, and hyperarousal. R. 8. The Board addressed these symptoms but found that "there is no indication from the record that they interfere with his ability to perform activities of daily living. *Id*. In dismissing these symptoms as such, the Board ignored this Court's directive that, because the DC's "plain language highlights its symptom driven nature," then "symptomatology should be the fact finder's primary focus when deciding entitlement to a given disability

> rating." *Vazquez-Claudio*, 713 F.3d. at 116-17.[10] Moreover, an inability to care for himself is not required to obtain a higher rating of 50% or 70%, and even a rating of 100% requires only "intermittent inability to perform activities of daily living." 38 C.F.R. § 4.130.

Appx7-8.[11]

Nonetheless, the court found this error non-prejudicial, concluding that Mr. Lynch, a *pro se* claimant, failed to sufficiently explain how the Board's

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[10] *Vazquez-Claudio v. Shinseki*, 713 F.3d 112 (Fed. Cir. 2013); *id*. at 117 (emphasizing that not only the type of symptoms, but the "frequency, severity, and duration of a veteran's symptoms must play an important role in determining his disability level") (citation and internal quotations marks omitted).

[11] In addition, the Board improperly focused on Mr. Lynch's then "current symptoms" as not "indicat[ing] that he has social and occupational impairment manifested by reduced reliability and productivity." Appx21. Mental disorders, in particular, require a complete historical evaluation of the overall disability, such as Mr. Lynch's PTSD, whose symptoms fluctuate greatly. 38 C.F.R. § 4.126(a) ("The rating agency shall assign an evaluation based on all the evidence of record that bears on occupational and social impairment rather than solely on the examiner's assessment of the level of disability at the moment of the examination."); *Davis v. Principi*, 276 F.3d 1341, 1345 (Fed. Cir. 2002) (Because "psychiatric disorders abate and recur," the VA is obligated to evaluate them "not by reference to isolated periods of activity or remission, but by assessing the effects of the disease or injury over the history of the condition.").

Moreover, the Board failed to consider staging Mr. Lynch's disability level for the appeal period. *See O'Connell v. Nicholson*, 21 Vet.App. 89, 93 (2007) ("Because the claims process before the agency can be lengthy, and because the level of a veteran's disability may fluctuate over time, staged ratings are a sensible mechanism for allowing the assignment of the most precise disability rating--one that accounts for the possible dynamic nature of a disability while the claim works its way through the adjudication process.").

erroneous evaluation of the evidence affected the result.[12] *See Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009) (holding that the burden of proof rests with the appellant to establish the prejudicial effect of an error). Surely missing from this harsh outcome is an evidentiary standard worthy of the VA's paternalistic and benevolent spirit. With this and similar factual records, the benefit-of-the-doubt/reasonable doubt rule should have more to say in deciding the claims of deserving disabled veterans.

CONCLUSION

For the reasons set forth in the opening and this reply brief, the *Ortiz* opinion should be overturned.

Dated: January 13, 2021

Respectfully,

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[12] Appx8.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, under Federal Rules of Appellate Procedure Rule 32(a)(7), that this brief is written in 14-point type-face and contains 3,392 words. *See* Fed.Cir.R. 28(a)(14).

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PROOF OF SERVICE

I hereby certify under penalty of perjury that on the 13th day of January, 2021, a copy of the foregoing:

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Department of Justice
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