Appeal No. 2020-1479

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THOMAS H. BUFFINGTON,
Claimant-Appellant

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

On Appeal from the United States Court of Appeals for Veterans Claims in No. 17-4382, Judge William S. Greenberg (dissenting), Judge Amanda L. Meredith, Judge Joseph L. Falvey, Jr.

BRIEF OF CLAIMANT-APPELLANT THOMAS H. BUFFINGTON

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CERTIFICATE OF INTEREST

Counsel for Appellant Thomas H. Buffington certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party represented by me is:

   Thomas H. Buffington

2. Name of the real party in interest (please only include any real party in interest NOT identified in Question 3) represented by me is:

   None

3. Parent corporations and publicly held companies that own 10% or more of the stock of the party:

   None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are:

   Stacy A. Tromble

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5), 14.5(b).

   None

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I. STATEMENT OF RELATED CASES

No other appeal in or from this action was previously before this or any other appellate court, other than the United States Court of Appeals for Veterans Claims (Veterans Court), the judgment of which is now on appeal.

Counsel knows of no other case pending in this Court or any other court that may directly affect, or be directly affected by, the Court's decision in this appeal.

II. JURISDICTIONAL STATEMENT

The Veterans Court exercised jurisdiction over this appeal in accordance with 38 U.S.C. § 7252(a), which grants it "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." *Id.*

This Court has jurisdiction to review a decision of the Veterans Court "on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision." 38 U.S.C. § 7292(a). This Court has exclusive jurisdiction to "review and 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).

III. STATEMENT OF THE ISSUE

The issue is whether the part of 38 C.F.R. § 3.654(b)(2) (regulation 3.654(b)(2)), limiting the resumption of payment of disability benefits to "the day following release from active duty if [a] claim for recommencement of payments is

received within 1 year from the date of such release," is a valid exercise of the Secretary's general rulemaking authority under 38 U.S.C. § 501(a) when: (1) the regulation conflicts with relevant statutes, which do not impose a one-year claim requirement that may result in disability compensation forfeiture, but which instead state that "the United States will pay" compensation to any disabled veteran commencing on the effective date of the compensation award, 38 U.S.C. §§ 1110, 5110, except that such pay will be discontinued "for any such period for which such person receives active service pay," 38 U.S.C. § 5304(c); and (2) the regulation's one-year claim requirement and resulting forfeiture do nothing to prevent duplication of disability compensation during periods of active service, the stated purpose of section 5304(c).

IV. STATEMENT OF THE CASE

A. Mr. Buffington's Service

Mr. Buffington served on active duty in the United States Air Force from September 1992 to May 2000. Appx513-520. Following this service, in July 2000, Mr. Buffington sought disability compensation for tinnitus. Appx1760. In 2002, the Department of Veterans Affairs (VA) awarded Mr. Buffington service connection and a 10% disability rating and set May 31, 2000, as the effective date of the award. Appx1760-1761. Thereafter, Mr. Buffington received disability compensation.

Mr. Buffington returned to active duty in the Air National Guard in July 2003. Appx513. In August 2003, Mr. Buffington informed VA of his return to active duty by filing a waiver form referring to section 5304(c) and stating that "[p]ayment of inactive duty pay may not be made to any veteran in receipt of VA compensation . . . unless the veteran elects waiver of VA benefits." Appx1732-1733. By filing the waiver, Mr. Buffington elected to receive pay for his active duty service in lieu of his VA disability compensation.

In October 2003, VA notified Mr. Buffington that his disability compensation would be discontinued effective July 20, 2003, the day before his active duty service with the National Guard began. Appx1728-1730. Mr. Buffington completed that period of National Guard active duty service in June 2004. Appx513. He served on active duty again from November 2004 until July 2005, in December 2009, and from February 2016 to May 2016. Appx516-519.

B. Mr. Buffington's Attempt to Have His Disability Compensation Reinstated

In January 2009, when no longer receiving active service pay, Mr. Buffington sought reinstatement of his disability compensation. Appx7; Appx1709. This was more than one year after his release from his periods of active service from July 2003 to June 2004 and November 2004 to July 2005. Appx7. His VA regional office (RO) reinstated his disability compensation, but the effective

date of reinstatement was not the date Mr. Buffington ceased receiving active service pay. Appx513; Appx1695-1698. Instead, his disability compensation was reinstated effective February 1, 2008, one year before he requested reinstatement. Appx1695. The RO stated that, "[b]y law [the VA is] only permitted to make payments retroactive to [1] year prior to the date [the VA] received [his] request." Appx1696. Because of when he filed for reinstatement, Mr. Buffington was held to have forfeited his disability compensation for periods when he was not in active service through January 31, 2008.

Mr. Buffington filed a Notice of Disagreement and thereafter perfected an appeal to the Board of Veterans' Appeals. Appx1692; Appx1652-1655; Appx1658-1680. In a July 2017 decision, the Board upheld the RO's effective date for resumption of VA disability compensation as February 1, 2008. Appx506-508. The Board's decision was based on regulation 3.654(b)(2), which states: "Payments, if otherwise in order, will be resumed effective the day following release from active duty if claim for recommencement of payments is received within 1 year from the date of such release: otherwise payments will be resumed effective 1 year prior to the date of receipt of a new claim." Appx506-509; 38 C.F.R. § 3.654(b)(2).

C. Mr. Buffington's Appeal to the Veterans Court

Mr. Buffington appealed to the Veterans Court, Appx2, arguing that regulation 3.654(b)(2) is inconsistent with 38 U.S.C. §§ 1110, 5110, and 5304(c). Appx110-114. Mr. Buffington contended that section 1110 requires VA to pay disability compensation from the effective date established by section 5110, and section 5304(c) permits VA to discontinue such compensation "for any period for which such person receives active service pay." Appx111. To the extent that regulation 3.654(b)(2) forbids VA from paying a veteran the disability compensation called for by a prior award of disability compensation when a veteran is no longer receiving active service pay, Mr. Buffington argued, the regulation is inconsistent with sections 1110, 5110, and 5304(c) and is therefore invalid. Appx113-114.

In interpreting section 5304(c), two of the three judges on the Veterans Court concluded that the "statutory language does not address the effective date for the discontinuation of benefits, or, as relevant here, the effective date and terms for the recommencement of benefits," notwithstanding the language in section 5304(c) limiting the period for which disability compensation "shall not be paid" to "any period for which such person receives active service pay." Appx8-9. As to construction of the statute, Judge Greenberg in dissent stated that the "statute

already delineates the period for which veterans may not receive VA benefits – while they are on active duty." Appx18.

Having found a gap in the statute, the majority of the Veterans Court panel further considered whether regulation 3.654(b)(2) was a valid exercise of the Secretary's general rulemaking authority under 38 U.S.C. § 501. Appx10-13. The majority concluded it was, characterizing regulation 3.654(b)(2) as providing merely "a procedure and structure for recommencing benefits upon release from active duty" and establishing "the nature and extent of proof and evidence and the method of taking and furnishing them." Appx10. In dissent, Judge Greenberg concluded that the "majority opinion reflects nothing more than a rubber stamping of the Government's attempt to misuse its authority granted under 38 U.S.C. § 501(a)." Appx18. Noting that the "Secretary may *only* prescribe rules and regulations that are 'necessary and appropriate to carry out the laws administered by the Department,'" the dissent stated that regulation 3.654(b)(2) "creates an unnecessary and inappropriate impediment to a veteran receiving benefits he has already established entitlement to." *Id*. The "fact that VA could have adopted a regulation that prescribed the procedure of reinstating benefits without including an effective date provision," according to the dissent, was "dispositive of whether 38 C.F.R. § 3.654(b)(2) is a 'necessary or appropriate' regulation." *Id*. The dissent

concluded that the "Secretary has exceeded his statutory authority here at the expense of service-connected veterans who were called back to active duty." *Id*.

V. SUMMARY OF THE ARGUMENT

Section 1110 directs that "the United States will pay to any veteran" compensation for "disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war." Section 5110 establishes when the section 1110 obligation to pay disability compensation begins.

Section 5304(c) carves out an exception, stating that disability compensation "shall not be paid" "for any period for which such person receives active service pay." This appeal concerns the validity of what amounts to an additional exception that the Secretary has promulgated through regulation 3.654(b)(2), and on which the Veterans Court relied, to preclude Mr. Buffington's disability compensation for periods after his release from active duty service because Mr. Buffington did not file a claim for recommencement within one year from his release from active duty.

This question is governed by the two-step framework of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Regulation 3.654(b)(2) fails at *Chevron* step one because Congress has directly spoken to when the Secretary will discontinue a

veteran's disability compensation due to active service pay. Under section 5304(c), such discontinuance is "for any period for which such person receives active service pay." Otherwise, based on sections 1110 and 5110, the United States "will pay" disability compensation once the obligation to pay commences. Collectively, these statutes unambiguously entitle Mr. Buffington to disability compensation for all periods (a) after the effective date of his award of disability compensation and (b) for which he did not receive active service pay. As Judge Greenberg stated in his dissent, "[t]he statute already delineates the period for which veterans may not receive VA benefits – while they are on active duty." Appx18. If any ambiguity exists after reading sections 1110, 5110, and 5304(c) in context, the pro-veteran canon requires that such ambiguity be resolved in Mr. Buffington's favor.

Regulation 3.654(b)(2) also fails at *Chevron* step two because it is not based on a permissible construction of sections 1110, 5110, and 5304(c). By engrafting a limitation not found in the statute, the regulation exceeds the Secretary's general rulemaking authority under 38 U.S.C. § 501 because it is neither "necessary or appropriate" nor "consistent with" sections 1110, 5110, and 5304(c). In Judge Greenberg's words, "[t]he majority's opinion" otherwise "reflects nothing more than a rubber stamping of the Government's attempt to misuse its authority granted under 38 U.S.C. § 501(a)." Appx18. In addition to being inconsistent with the statute, application of the regulation to veterans like Mr. Buffington produces the

absurd result that veterans who do not advise VA that they have returned to active service are treated better than those who do, the former having disability compensation discontinued just during their period of active service and the latter potentially also outside of that period. As Judge Greenberg stated in dissent, "[t]he Secretary has exceeded his statutory authority here at the expense of service-connected veterans who were called back to active duty." Appx18.

This Court should thus hold that regulation 3.654(b)(2)'s one-year filing requirement and resulting forfeiture of disability compensation is invalid and reverse the decision of the Veterans Court.

VI. ARGUMENT

A. Standard of Review

This Court "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions," 38 U.S.C. § 7292(d), and reviews the Veterans Court's statutory interpretation de novo. *O'Brien v. Wilkie*, 948 F.3d 1339 (Fed. Cir. 2020); *Carr v. Wilkie*, No. 19-2441 (Fed. Cir. Jun. 11, 2020), slip op. at 9. This Court "shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that [this Court] finds to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. § 7292(d).

When an agency interprets a statute by promulgating a regulation, as the Secretary did here, judicial review of the regulation is governed by *Chevron*. This Court recently considered the *Chevron* framework en banc in the context of the Agent Orange Act, 38 U.S.C. § 1116. *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019). The *Procopio* Court noted that *Chevron* establishes a two-step framework. At step one, the court considers "whether Congress has directly spoken to the precise question at issue." *Id*. at 1375. "If the intent of Congress is clear, that is the end of the matter," and "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue," the court proceeds to *Chevron* step two, asking "whether the agency's answer is based on a permissible construction of the statute." *Id*. (citations omitted).

B. The Relevant Statutes and Regulation

At issue is whether the one-year filing requirement in regulation 3.654(b)(2), which may result in forfeiture of disability compensation outside a veteran's period of active service, is consistent with §§ 1110, 5110, and 5304(c), which together provide that the United States "will pay" veterans disability compensation commencing on the effective date of the award except for "any period for which such person receives active duty pay" and is a valid exercise of the Secretary's general rulemaking authority under 38 U.S.C. § 501.

Section 1110 is titled "Basic entitlement" and states in part that "[f]or disability . . . the United States will pay to any veteran thus disabled . . . compensation as provided in this subchapter." 38 U.S.C. § 1110.

Section 5110 is titled "Effective dates of awards" and establishes when the obligation to pay compensation to a veteran starts, "[u]nless specifically provided otherwise in this chapter." 38 U.S.C. § 5110(a).

Section 5304 is titled "Prohibition against duplication of benefits." Subsection 5304(c) states that compensation "on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay." 38 U.S.C. § 5304(c).

Section 501 grants the Secretary general authority to:

> prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including (1) regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws; (2) the forms of application by claimants under such laws; (3) the methods of making investigations and medical examinations; and (4) the manner and form of adjudications and awards.

38 U.S.C. § 501.

Regulation 3.654 is titled "Active service pay." Subsection (b)(2), titled "Active duty," states in part that "[p]ayments, if otherwise in order, will be resumed effective the day following release from active duty if claim for recommencement of payments is received within 1 year from the date of such

release: otherwise payments will be resumed effective 1 year prior to the date of receipt of a new claim." 38 C.F.R. § 3.654(b)(2).

C. Regulation 3.654(b)(2) Is Inconsistent with the Statute

Through sections 1110, 5110, and 5304(c), Congress has spoken directly to the period for which the Secretary may, after the effective date of an award of disability compensation, discontinue a veteran's disability compensation due to active service pay. Regulation 3.654(b)(2), which allows discontinuance of disability benefits outside of the statutory period, thus fails at *Chevron* step one. Because "the intent of Congress is clear, that is the end of the matter." *Procopio*, 913 F.3d at 1381. If this Court concludes there is any ambiguity in the statute, the pro-veteran canon instructs that such ambiguity be resolved in favor of the veteran.

1. Congress Has Directly Spoken to the Time Period for Which the Secretary May Discontinue a Veteran's Disability Compensation Due to Active Service Pay

The Veterans Court recognized that the "first question in statutory interpretation is always 'whether Congress has directly spoken to the precise question at issue.'" Appx8 (quoting *Chevron*, 467 U.S. at 842). Here, the precise question is whether Congress has directly spoken to the time period for which the Secretary may discontinue Mr. Buffington's disability compensation while he was receiving active service pay. The answer is yes. Sections 1110 and 5110 establish that the United States "will pay" Mr. Buffington disability benefits beginning on

the effective date of the award and section 5304(c) establishes the duration of discontinuance as "any period for which [Mr. Buffington] receives active service pay." 38 U.S.C. §§ 1110, 5110, and 5304(c). Through these provisions, Congress unambiguously intended that the Secretary discontinue Mr. Buffington's disability compensation only for the period when he is receiving active service pay.

a. Section 5304(c) States that Disability Compensation Will Be Discontinued When a Veteran Is Receiving Active Service Pay; Otherwise, Under Section 1110, the United States "Will Pay" Benefits

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). This is because "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

Section 1110 articulates a straightforward and unambiguous requirement that the Secretary "will pay" a veteran's disability compensation. Section 5110 establishes the date from which the Secretary's obligation to pay a veteran's disability compensation is triggered. There is no dispute here that the Secretary's obligation to pay Mr. Buffington his disability compensation was triggered before he entered active duty service in 2003. Appx2-3.

Section 5304(c), part of a provision prohibiting duplication of benefits, states that "[p]ension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay." 38 U.S.C. § 5304(c). The Veterans Court noted that "[b]y its terms, section 5304(c) establishes an unequivocal bar to dual compensation" and imposes a limitation on section 1110: "VA 'shall not' pay pension or compensation benefits to any person on account of that person's service during any period for which that person receives active service pay." Appx8-9. The Veterans Court thus recognized that the carve-out in section 5304(c) must be read in the context of the "[b]asic entitlement" to benefits governed by 38 U.S.C. § 1110.[1] The Veterans Court further recognized that the carve-out in section 5304(c) was for "any period for which that person receives active service pay." Appx9.

Section 5304(c) thus provides an express and limited carve-out to Section 1110 to prevent a veteran from being paid disability compensation and active service pay at the same time. Read together then, sections 1110, 5110, and 5304(c) provide a general rule and a limited exception: The Secretary "will pay" Mr. Buffington's disability compensation after the effective date of his award of

[1] Sections 1110 and 5304(c) were enacted together to consolidate into one Act all of the laws administered by the VA and for other purposes, Pub. L. No. 85-857, §§ 310, 3104, 72 Stat. 1105, 1119, 1230-1231 (1958).

disability compensation "except for any period for which [he] receives active service pay." Based on the statutes, the period the Secretary will *not* pay Mr. Buffington's disability compensation is the "period for which [he] receives active service pay."

Congress has, therefore, directly spoken to when the Secretary may discontinue a veteran's disability compensation due to active service pay. The Secretary may discontinue Mr. Buffington's disability compensation for the "period for which [he] receives active service pay." This accomplishes the stated goal of section 5304(c)—preventing a duplication of benefits because the veteran will not receive disability compensation and active service pay at the same time.

This reading of section 5304(c) is consistent with its surrounding text. In particular, section 5304(a)(1) prohibits duplication of benefits by providing that "not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay . . . shall be made *concurrently* to any person" (emphasis added). Section 5304(c) similarly prohibits duplication of benefits by ensuring that disability compensation and active service pay are not received concurrently. "Surely these two provisions must be given an harmonious reading." *Harmon v. Brucker*, 355 U.S. 579, 582 (1958) (preferring a "harmonious" interpretation of two military statutes).

Surrounding sections of the statute in the same chapter support this interpretation. For example, 38 U.S.C. § 5306 addresses renouncement of rights to benefits and states that "[r]enouncement of rights shall not preclude any person from filing a new application . . . but such new application shall be treated as an original application, and no payments shall be made for any period before the date such new application is filed." 38 U.S.C. § 5306(b). Further, "if a new application . . . is filed within one year after renouncement of that benefit, such application shall not be treated as an original application and benefits will be payable as if the renouncement had not occurred." 38 U.S.C. § 5306(c). Under section 5306, therefore, Congress specifically restricted the time period for which veterans can receive benefits if the veteran has renounced those benefits. The veteran must file an application for benefits within one year of renouncement to receive payment "as if the renouncement had not occurred." In contrast, in section 5304(c), Congress did not restrict payment based on the filing of an application for benefits. Instead, under section 5304(c), the Secretary may discontinue Mr. Buffington's disability compensation for the "period for which [he] receives active service pay."

Because "the statutory language is unambiguous and 'the statutory scheme is coherent and consistent,'" the inquiry at *Chevron* step one ends. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (*quoting Robinson v. Shell Oil Co.*,

519 U.S. 337, 340 (1997)). "If the intent of Congress is clear, that is the end of the matter," and "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

Sections 1110, 5110, and 5304(c), read in context, unambiguously establish that the period for which Secretary will not pay Mr. Buffington's disability compensation is the "period for which [he] receives active service pay." As noted by the Veterans Court's dissent, the statute "delineates the period for which veterans may not receive VA benefits – while they are on active duty." Appx18. The inquiry should thus stop there and the portion of regulation 3.654(b)(2) allowing forfeiture of disability compensation outside the period of active service should be invalidated.

b. Interpreting the Statute as Defining the Period for Which Veterans Will Not Receive Disability Compensation — While on Active Duty — Does Not "Insert Limiting Language" into the Statute

The Veterans Court rejected Mr. Buffington's straightforward statutory construction, noting his argument that sections 1110 and 5304(c), read together, mean "VA must suspend or withhold benefits, but *only* 'for any period for which such person receives active service pay.'" Appx9 (citations omitted). The Veterans Court reasoned that "the word 'only' does not appear in the statute and the Court will not insert limiting language that is not present in the statute." *Id*.

A straightforward construction of the statute as identifying the period for which the payment of disability compensation is discontinued, however, does not mean that the word "only" is being read into the statute. Instead, such an interpretation recognizes the unremarkable proposition that when, as here, there is a single statutory carve-out to the payment of disability compensation, there is only one. That is not reading the word "only" into the statute; it is interpreting the statute as written.

The Veterans Court relied on *Bates v. United States*, 522 U.S. 23 (1997) for the proposition that words must not be read into a statute. Appx9. That reliance was misplaced. In *Bates*, a criminal defendant contended that his conviction was invalid because it required an allegation of his "intent to injure or defraud the United States." *Id*. at 29. In rejecting that argument, the Supreme Court stated that the text of the relevant criminal statute did "not include an 'intent to defraud' state of mind requirement, and we ordinarily resist reading words or elements into a statute that do not appear on its face." *Id*. Here, by contrast, Mr. Buffington asks that the statute be interpreted exactly as written, namely, to discontinue his disability compensation "for any period for which such person receives active service pay." 38 U.S.C. § 5304(c).

Further, accepting the Veterans Court's logic that the statute must specifically state that the period of discontinuance of disability compensation while

on active duty is the "only" such period would turn the statute upside down, allowing VA to discontinue disability compensation in situations and for reasons Congress never contemplated. This cannot be correct and instead directly contradicts Congress's directive in section 1110 that the United States "will pay" veterans benefits to which they are entitled. *See United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1382 (Fed. Cir. 2009) ("'Will' is a mandatory term, not a discretionary one.")

c. Section 5112(b)(2), Addressing the Effective Date of Discontinuance, Does Not Change the Result

The Veterans Court criticized an interpretation of sections 1110 and 5304(c) as establishing a defined period of discontinuance of disability compensation during active duty service based on another statutory provision, 38 U.S.C. § 5112(b)(3). Appx9. In particular, the Veterans Court stated that it would "not adopt the appellant's construction of sections 1110 and 5304(c) as the governing authority because doing so would effectively render Congress's specific directive in section 5112(b)(3) superfluous." *Id*. That is not so.

Section 5112(b)(3) states that the "effective date of a reduction or discontinuance of compensation . . . by reason of receipt of active service pay or retirement pay shall be the day before the date such pay began." The "specific directive" in section 5112(b)(3) identified by the Veterans Court is that the effective date of discontinuance or reduction of different types of pay is the day

before active duty or retirement pay starts. *See* 38 U.S.C. § 5112(b)(3). As applied to Mr. Buffington, section 5112(b)(3) means that his disability compensation was discontinued the day before his active duty pay started, as opposed to, for example, the date *that* his active service pay began.

By separately providing a specific start date of discontinuance as the day before active service in section 5112(b)(3) and the period of discontinuance in section 5304(c), these two provisions are directed to different aspects of the discontinuance of disability compensation while a veteran receives active service pay, namely, (1) when specifically the discontinuance starts and (2) how long the discontinuance lasts.

Specifically, section 5304(c) provides that a veteran will not receive disability compensation while in receipt of active service pay. Section 5112(b)(3), which is implemented in regulation 3.654(b)(1), deems that date to be the day before the active duty pay begins. Congress just as easily could have chosen a different date in section 5112(b)(3). It did so in other circumstances. For example, when a payee marries, remarries, or dies, the last day of payment is the last day of the month in which any of those events occurred. 38 U.S.C. § 5112(b)(1). The statute sets the effective date as the last day of the month in which an event occurs in other situations. *See* 38 U.S.C. §§ 5112(b)(2) ("marriage, annulment, divorce, or death of a dependent of a payee"), (b)(5) ("change in disability or employability of

a veteran in receipt of a pension"), and (b)(7) ("discontinuance of school attendance of a payee or a dependent of a payee"). In other circumstances, the statute sets the last day of the calendar year in which an event occurred as the effective date of a reduction or discontinuance of payment. 38 U.S.C. § 5112(b)(4)(B). In still other circumstances, the statute sets "the last day of the month following sixty days from the date of notice to the payee" as the effective date. 38 U.S.C. § 5112(b)(6). That Congress specifically set different effective dates for discontinuance or reduction in payment in different circumstances does not impact the duration of such discontinuance or reduction from the effective date. Contrary to the Veterans Court's reasoning, therefore, section 5112(b)(3) is not rendered superfluous; it specifies the start date of the discontinuance, while section 5304(c) articulates the period of the discontinuance.

As support for its assessment that section 5112(b)(3) was rendered superfluous, the Veterans Court relied on *Sharp v. United States*, 580 F.3d 1234 (Fed. Cir. 2009) for the proposition that "the canon against surplusage requires courts to avoid an interpretation that results in portions of text being read as meaningless." Appx9, *citing* 580 F.3d at 1238. In *Sharp*, however, this Court rejected the government's proposed statutory interpretation, which made it "effectively impossible" to obtain the benefit of a specific statutory provision. *Id*. Here, interpreting sections 1110 and 5304(c) as defining the duration of

discontinuance of disability compensation does not render it effectively impossible to apply the date of discontinuance of disability compensation as "the day before" active duty "pay began," as defined in section 5112(b)(3). Contrary to the Veterans Court's analysis, section 5112(b)(3) is not rendered "meaningless." Instead, as in *Sharp*, the plain language of section 5112(b)(3) supports that the statute applies to the period of discontinuance set out in sections 1110 and 5304(c) and section 5112(b)(3) specifically identifies the start date of discontinuance as the day before active duty pay starts.

The Supreme Court's decision in *Duncan v. Walker*, 533 U.S. 167 (2001), also relied on by the Veterans Court, Appx9, does not change that result. There, the question was whether a Federal habeas petition tolled a limitation period where the statutory exception applied to "State post-conviction or other collateral review." *Duncan* at 172-74. The Supreme Court concluded that considering a Federal habeas petition as "other collateral review" would "render the word 'State' insignificant, if not wholly superfluous." *Id*. Interpreting sections 1110 and 5304(c) as setting the duration of discontinuance of disability pay, by contrast, does not render section 5112(b)(3), setting the specific date when discontinuance begins, insignificant or wholly superfluous. This is especially true in light of the remainder of section 5112(b), which sets different start dates of discontinuance in varying circumstances.

d. The Veterans Court Framed the Issue Incorrectly, as Whether the Secretary Can Predicate an Effective Date of Recommencement on the Date of a Veteran's Claim Instead of Whether the Statute Defines the Period of Discontinuance

The Veterans Court posited that "Congress did not speak to the precise question at issue: Whether the Secretary may predicate the effective date for the recommencement of benefits on the date of the veteran's claim." Appx9; *see also* Appx8 ("The statutory language does not address . . . the effective date and terms for the recommencement of benefits."). But Congress *did* specify the terms for the recommencement of benefits through sections 1110, 5110, and 5304(c). Sections 1110 and 5110 establish that the United States "will pay" Mr. Buffington disability benefits beginning on the effective date of the award, which preceded his re-entry into active duty service. Section 5304(c) establishes the duration of discontinuance as "any period for which [Mr. Buffington] receives active service pay." It inexorably follows from the language Congress used that the effective date for recommencement of benefits is the first day on which the veteran is no longer receiving active service pay.

While the Veterans Court asked whether the Secretary can predicate an effective date of recommencement on the date of a veteran's claim, the correct question is whether the Secretary can by regulation impose a forfeiture when Congress explicitly limited the period of discontinuance to "any period for which

such person receives active service pay." 38 U.S.C. § 5304(c). The answer to that is question is no.

First, effecting a forfeiture of disability compensation outside the period identified in section 5304(c) is inconsistent with that provision. It is also inconsistent with other sections of Title 38. As the Veterans Court noted, section 5313 establishes "*both* the beginning and ending date of the limitation on payment of compensation to persons incarcerated for conviction of a felony." Appx9. Specifically, section 5313 sets payment discontinuance as beginning "on the sixty-first day of such incarceration" and ending "on the day such incarceration ends." 38 U.S.C. § 5313(a)(1). Section 5304(c) likewise sets payment discontinuance as "any period for which such person receives active service pay." That section 5304(c) does not specifically use the words "ending on the day," as in section 5313, does not mean that section 5304(c) does not identify the end of the period of discontinuance. It does. By defining the "period" of discontinuance, section 5304(c) necessarily identifies the start of recommencement: when such person does not receive active service pay.

While framing the question as the effective date of recommencement of disability compensation, the Veterans Court did not specifically address section 5110, which identifies the effective date on which the Secretary's section 1110 obligation to pay begins. In some circumstances, the obligation to pay begins the

day VA receives a claim. But in others, some portion of benefits may be forfeited if an application for benefits is not received within one year of a defined event. *See, e.g.*, §§ 5110(b)(1) (setting "the effective date of an award of disability compensation to a veteran" as "the day following the date of the veteran's discharge or release *if application therefore is received within one year from such date of discharge*") (emphasis added); (b)(3) (similar for "increased compensation"); (b)(4) (similar for "disability pension"); (c) (similar for "disability compensation"); (d) (similar for "death compensation, dependency and indemnity compensation, or death pension"); (e) (similar for "dependency and indemnity compensation to a child"); (f) (similar for "additional compensation on account of dependents"); (i) (similar for "readjudicat[ion]" of a "disallowed claim").

Section 5110 thus specifies circumstances in which benefits may be forfeited if an application is not filed within one year of a triggering event. This section makes crystal clear that Congress knew how to implement one-year application date forfeiture consequences. Section 5110 contains no such forfeiture for the recommencement of benefits following active service. *See* 38 U.S.C. § 5110. The Veterans Court recognized this. *See* Appx8 (referencing section 5110 and stating that section 1110 by "its terms does not establish when disability compensation payments shall begin or place any limitation on continued receipt of compensation benefits"), and Appx11 (referencing the Secretary's oral argument, analogizing the

time period in regulation 3.654(b)(2) to the one-year provision in section 5110(b)(1)). The forfeiture the Secretary imposed by regulation 3.654(b)(2) is thus inconsistent with section 5110.

Section 5304(c) itself identifies the period of discontinuance. Section 5110 makes clear that Congress did not engraft application-filing forfeiture consequences on the recommencement of disability compensation. Because Congress has spoken to the precise question here, namely the period for which disability compensation shall not be paid, "that is the end of the matter." *Procopio*, 913 F.3d at 1375. The decision of the Veterans Court should be reversed.

2. The Pro-Veteran Canon Demands Resolving Any Interpretive Doubt in Favor of Mr. Buffington

The Supreme Court in *Chevron* indicated that traditional tools of statutory construction are used before considering whether deference is owed to the Secretary's interpretation. In particular, the Supreme Court has explained that "we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9). Accordingly, "deference is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). "Where . . . the canons supply an answer, '*Chevron* leaves the stage.'" *Id*.

One canon that takes precedence over deference to VA is "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson v. Shinseki*, 562 U.S. 428, 430 (2011) (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220–21 n. 9 (1991)). *Brown v. Gardner* indicates that this canon applies at *Chevron* step one. 513 U.S. 115, 118 (1994). In *Brown*, the Supreme Court declined to find an ambiguity in a statute before applying "the rule that interpretive doubt is to be resolved in the veteran's favor." *Id.* (citing *King*, 502 U.S. at 220–21 n. 9 (1991)). *See also, e.g.*, *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000) ("[M]odifying the traditional *Chevron* analysis is the doctrine governing the interpretation of ambiguities in veterans' benefit statutes—that 'interpretative doubt is to be resolved in the veteran's favor[.]'") (quoting *Brown*, 513 U.S. at 118); *Procopio v. Wilkie*, 913 F.3d at 1383 (O'Malley, J., concurring) ("[T]he pro-veteran canon, like every other canon of statutory construction, can and should apply at step one of *Chevron* to help determine whether a statutory ambiguity exists."). Thus, as in *Brown*, the pro-veteran canon should be applied here, before the *Chevron* step one analysis is complete, to resolve any interpretive doubt in Mr. Buffington's favor.

The precise question here is whether the Secretary can discontinue Mr. Buffington's disability compensation for a period longer than that specified in section 5304(c). Mr. Buffington urged the Veterans Court to read sections 1110

and 5304(c) as permitting discontinuance of disability benefits for just the period when a veteran is receiving active service pay. Appx111. The Secretary, by contrast, urged the Veterans Court to interpret section 5304(c) as permitting discontinuance of disability benefits in circumstances other than when a veteran is receiving active service pay. Appx135. Construing section 5304(c) (the period of discontinuance) and section 1110 (the United States "will pay") "in the beneficiaries' favor," as *Henderson* instructs, commands Mr. Buffington's interpretation that additional periods of discontinuance resulting in disability compensation forfeiture are not permitted. 562 U.S. at 430.

As a result, even if there is any ambiguity when interpreting sections 1110 and 5304(c) in their statutory context, such ambiguity must be resolved in favor of Mr. Buffington under the pro-veteran canon. On that basis as well, the decision of the Veterans Court should be reversed.

D. Regulation 3.654(b)(2) Is Not Based on a Permissible Construction of the Statute Because it Exceeds the Rulemaking Authority Granted to the Secretary and Produces an Absurd Result

If it is necessary to proceed to *Chevron* step two, regulation 3.654(b)(2) fails there as well. Under *Chevron*, if "the statute is silent or ambiguous with respect to the specific issue," the inquiry proceeds to step two, at which courts ask "whether the agency's answer is based on a permissible construction of the statute."

Chevron, 467 U.S. at 843. Only if it is, will the agency's answer be entitled to deference. *Id*.

Deference is ordinarily owing to an agency construction if the court concludes that the regulation "[implements] the congressional mandate in some reasonable manner." *United States v. Correll*, 389 U.S. 299, 307 (1967). "[T]his general principle of deference, while fundamental, only sets the framework for judicial analysis; it does not displace it." *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 17 (1982), quoting *United States v. Cartwright*, 411 U.S. 546, 550 (1973).

Regulation 3.654(b)(2) fails at *Chevron* step two because it is not based on a permissible statutory construction. This is because it both exceeds the Secretary's general rulemaking authority under 38 U.S.C. § 501 and produces an absurd result.

1. Section 3.654(b)(2) Exceeds the Secretary's Rulemaking Authority under Section 501

Section 501 confers on the Secretary the "authority to prescribe all rules and regulations which are *necessary or appropriate* to carry out the laws administered by the Department and are *consistent with those laws*." 38 U.S.C. § 501 (emphases added). Regulation 3.654(b)(2) exceeds the Secretary's authority under section 501 because it is neither "necessary or appropriate" to carry out the statute nor "consistent with" the statute.

a. Regulation 3.654(b)(2) Is Not "Necessary or Appropriate" to Carry Out the Statute Because it Does Not Address Duplication of Benefits

Section 5304, titled "Prohibition against duplication of benefits," operates to prevent duplication of benefits to veterans. Section 5304(a)(1), for example, provides that "not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay . . . shall be made concurrently to any person." As another example, section 5304(b)(3) ensures that "[b]enefits . . . not be paid to any person by reason of the death of more than one person to whom such person was married." Section 5304(d)(1) provides that "the amount of pension and compensation benefits payable to a person under this title shall be reduced by the amount of any lump sum payment made to such person under" another statutory provision. Like those provisions, section 5304(c) prevents duplication of benefits by providing that "[p]ension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay." 38 U.S.C. § 5304(c).

The one-year claim requirement in regulation 3.654(b)(2), by contrast, is not necessary or appropriate to carry out the goals or purpose of section 5304(c) because it has nothing to do with preventing the duplication of benefits. Instead, unrelated to duplication of benefits, that portion of the regulation effects a forfeiture of benefits based on a one-year deadline to notify VA upon release from

active duty service. Specifically, a veteran's disability compensation "will be resumed effective the day following release from active duty" so long as the veteran files a "claim for recommencement of payments" within one year of her release. If the veteran does not file such a "claim for recommencement" within one year, disability compensation "will be resumed effective 1 year prior to the date of receipt of a new claim," 38 C.F.R. § 3.654(b)(2), and any disability compensation the veteran would otherwise be entitled to before that one-year date is forfeited.

The one-year deadline is irrelevant to any duplication of benefits. In fact, if the one-year deadline were removed such that disability compensation *always* "resumed effective the day following release from active duty," no duplication of benefits would occur. Rather, consistent with section 5304(c), a veteran's disability compensation would "not be paid . . . for any period for which [the veteran] receives active service pay."

Because the one-year deadline in regulation 3.654(b)(2) does nothing to carry out the purpose of section 5304, namely the "[p]rohibition against duplication of benefits," it is not "necessary or appropriate" to carry out the statute. 38 U.S.C. § 501. For this reason, the regulation exceeds the authority granted the Secretary by section 501 "to prescribe all rules and regulations which are necessary or appropriate to carry out" the statute.

The Veterans Court noted this argument but did not substantively address it. *See* Appx10-11. The Veterans Court instead reasoned that regulation 3.654(b)(2) was appropriately enacted under section 501 because it falls within two of the categories of regulations that section 501 states are "necessary or appropriate:" those establishing "the nature and extent of proof and evidence and the method of taking and furnishing them" and "the forms of application [for] benefits, and the manner of awards." Appx10-11; 38 U.S.C. §§ 501(a)(1), (2). But Mr. Buffington does not challenge the "nature and extent of proof and evidence" required by regulation 3.654(b)(2); nor does he challenge the "form[] of application." To the contrary, Mr. Buffington expressly stated to the Veterans Court that "it is not [his] position that VA cannot require that a veteran notify it that the veteran is no longer receiving active duty pay before benefits can be *paid.*" Appx9, Appx113 n.3. He also does not challenge the "nature," "extent," or "form" that such notice must take.

Mr. Buffington's challenge lies instead with linking the deadline for providing that notice imposed by the regulation to the forfeiture of statutory benefits resulting from that deadline. The regulation is outside the scope of section 501, Mr. Buffington argues, because "VA cannot tie the *effective date* of the resumption of benefits to the date of such notification because doing so conflicts with the plain language of 38 U.S.C. § 5304(c)." Appx9 n.1; Appx113 n.3. Even if

section 501 grants the Secretary the authority to craft a regulation requiring veterans to give VA notice of their release from active duty service, it does not grant the Secretary authority to impose a forfeiture of disability compensation to which veterans are otherwise statutorily entitled if that notice is not given within one year (or any specified timeframe).

b. One-Year Deadlines Elsewhere Do Not Make Such a Requirement Necessary or Appropriate in Regulation 3.654(b)(2)

The Veterans Court justified the Secretary's "broad authority" by noting other one-year deadlines in the veterans' benefits scheme: 38 U.S.C. § 5110(b)(1) and a regulation addressed in *Jernigan v. Shinseki*, 25 Vet. App. 220 (2012). Appx11-12. Neither supports a conclusion that regulation 3.654(b)(2) was a permissible exercise under VA's rulemaking authority.

Section 5110(b)(1) states that "[t]he effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release *if application therefor is received within one year from such date of discharge or release*." (emphasis added).[2] Congress thus specifically tied the effective date of an award of disability compensation to a one-year filing

[2] The Veterans Court recognized that section 5110(b)(1) does not apply to the recommencement of disability benefits. Appx12 ("Congress was silent regarding when and how VA shall resume the payment of benefits after a veteran's release from active duty), Appx11 (identifying section 5110(b)(1) as analogous).

deadline from discharge or release. Section 5110(b)(1) thus demonstrates that Congress knew how to impose forfeiture based on a deadline for the receipt of a claim for benefits when it wanted to. The lack of such a provision for the recommencement of disability compensation shows that Congress did not intend to impose a forfeiture of disability compensation once a veteran's period of active service ends. The Secretary thus exceeded his rulemaking authority by enacting an effective date with forfeiture consequences when Congress specifically did not. That section 5110 was originally enacted in the very same law as section 5304(c) as an Act to consolidate all laws administered by the VA, Pub. L. No. 85-857, §§ 3010, 3104, 72 Stat. 1105, 1226-1227, 1230-1231 (1958), confirms that Congress chose to include a one-year deadline in section 5110 and chose not to in section 5304(c).

The Veterans Court relied on *Jernigan* for the proposition that it "has previously upheld time limitations for filing a claim and '1 year' is generally used throughout title 38." Appx11. That reliance was misplaced. The Veterans Court focused on language in *Jernigan* regarding whether VA may prescribe "forms" and whether a timing requirement can be part of a "form." Appx11-12. Based on *Jernigan*, the Veterans Court concluded that "Congress expressly delegated authority to VA to determine the appropriate 'forms of application'" and that "Congress's 'express delegation, along with the Court's determination that the

Secretary's interpretation of 'form' to include a timing requirement is reasonable, is sufficient to hold that [the Secretary's regulation] is not 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" Appx12.

In *Jernigan*, the Veterans Court considered a timing requirement in 38 C.F.R. § 3.155, which provides in part that: "Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim." *Id*. at 224. In considering whether that timing requirement was an appropriate exercise of the Secretary's rule-making authority, the Veterans Court relied on a one-year requirement in the corresponding statute, 38 U.S.C. § 5103(a), for a claimant to provide information following notification of an incomplete application. 25 Vet. App. at 226 (noting the one-year requirement in section 5103(a) and stating, "based on the language of section 5103, it was not 'arbitrary or capricious in substance, or manifestly contrary to the statute' for VA to require that a formal claim be filed within one year of notification.")

Indeed, while stating that the timing requirement in section 5103, relating to submission of information following notification, was different from the timing requirement for a formal application in regulation 3.155(a), the Veterans Court recognized that they were interrelated. *Id*. at 228 (stating that the one-year timing

requirement of "section 5103(a) expressly ruled out the possibility of an effective date as of the date VA received an informal (that is, incomplete) claim if the missing evidence was not received within one year of VA's request)."

The decision in *Jernigan* does not turn on whether VA can require forms and does not stand for the proposition that VA can impose timing-based forfeiture of benefits under the guise of requiring forms. Appx11-12. Instead, in *Jernigan*, the Veterans Court found that the one-year time limit in the regulation was reasonable after noting the interrelated one-year deadline in the corresponding statute. *Jernigan* does not stand for the proposition that the Secretary can impose one-year deadlines and resulting forfeiture in the absence of any corresponding deadline in the statute, as the Veterans Court suggested. Appx10-11.

Moreover, Mr. Buffington does not dispute that VA can require a veteran to notify it if the veteran is no longer receiving active duty pay before disability compensation will be recommenced. VA, however, cannot tie an effective date of the recommencement of benefits to the date of such notification and effect a forfeiture of disability compensation absent such notice within a given timeframe because doing so conflicts with sections 1110 and 5304(c) and imposes a substantive limitation on entitlement nowhere stated or implied by the statute.

c. The Precedent Opinion of VA Office of General Counsel and Statements Made by the Secretary at Argument Do Not Support that the Timing Requirement in Regulation 3.654(b)(2) Is Necessary or Appropriate

Citing to a precedent opinion of VA Office of General Counsel and statements the Secretary provided at oral argument, the Veterans Court concluded that regulation 3.654(b)(2) "reasonably requires a veteran to file a claim for recommencement." Appx11, citing VA Op. Gen. Couns. Prec. 5-95 (Feb. 6, 1995).

The Veterans Court is not bound by precedent opinions of the VA General Counsel. *Theiss v. Principi*, 18 Vet. App. 204, 210 (2004). Neither is this Court. Regardless, the precedent opinion cited by the Veterans Court does not address the issue here. In Prec. 5-95, VA considered whether a disability rating was continuous for purposes of 38 U.S.C. § 110, which provides protection of a disability rating that has been continuously rated for twenty or more years. 38 U.S.C. § 110. There, the question was whether, in 1995, a 1946 disability rating was protected under section 110 when it had been discontinued based on the veteran's return to active service. VA's General Counsel concluded that "the disability cannot be considered to have been continuously rated during the period in which compensation is discontinued." Prec. 5-95 at holding. Whether a rating is continuous, however, is not relevant to whether VA can impose a forfeiture of disability compensation outside the period for which VA will discontinue payments due to active service.

In reaching its conclusion, VA OGC stated that "[a]lthough VA regulations have been somewhat ambiguous regarding the effect of the VA's actions when a person in receipt of VA compensation or pension returns to active duty, it appears that reentry on active duty results in termination of the veteran's award and accompanying disability rating." Prec. 5-95 at Comment 8. This is similar to statements of the Secretary at oral argument that the Veterans Court relied on, namely "when veterans return to active duty, their awards of compensation benefits are terminated." Appx11. The Veterans Court also relied on the Secretary's statements that while a veteran's service connection remains in place "it is necessary for VA to readjudicate and evaluate a veteran's service connected disability upon return from active duty to ascertain the current level of severity." *Id*. These statements, however, all involve the processes VA may create for evaluating claims and compensation levels, not whether VA can discontinue payments outside the period of active service pay. This is clear from the conclusion of the Veterans Court that "VA's regulation reasonably requires a veteran to file a claim for recommencement." Appx11. That, however, is not the point. Whether a veteran must file a claim for recommencement is not tied to whether VA can unilaterally refuse payment of disability benefits for a period longer than the period of active service. This VA cannot do.

d. The Timing Requirement in Regulation 3.654(b)(2) Is Not Consistent with Section 5304(c) Because it Exceeds the Scope of any Possible Gap in the Statute

The Veterans Court further reasoned that "[a]lthough Congress chose to govern the date that VA benefits shall be discontinued upon a veteran's return to active duty, 38 U.S.C. § 5112(b)(3), Congress was silent regarding when and how VA shall resume the payment of benefits after a veteran's release from active duty." Appx12. According to the Veterans Court, the "Secretary filled the gap left by Congress" and therefore the "regulation is necessary and appropriate to carry out the laws administered by the Department." *Id*.; *see also* Appx9 ("[t]he statutory language does not address . . . the effective date and terms for the recommencement of benefits.")

In determining "whether the agency's answer is based on a permissible construction of the statute," it must be ascertained whether the agency's regulation fills a "gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Here, regulation 3.654(b)(2) exceeds the scope of any possible gap left by the statute and is, therefore, invalid.

Sections 1110 and 5304(c) do not specify if the "period for which [a veteran] receives active service pay" begins the date active duty service begins or the date *before* active duty service begins. Section 5112(b)(3) selects between these two dates for the discontinuation of disability compensation by providing that "[t]he

effective date of a . . . discontinuance of compensation . . . by reason of receipt of active service pay . . . shall be the day before the date such pay began."

The Veterans Court correctly observed that there is no comparable section addressing a specific date for the recommencement of benefits. Appx9. But this absence does not mean, as the Veterans Court concluded, that the statute is "silent regarding when . . . VA shall resume the payment of benefits after a veteran's release from active duty." Appx12. Instead, section 5304(c) identifies "the period" of discontinuance as when "such person receives active service pay." There is, therefore, no gap, and certainly not one that would permit the Secretary implement a regulation causing a forfeiture of disability compensation outside of the discontinuance period specified in section 5304(c).

Regulation 3.654(b)(2) far exceeds that scope. It not only identifies "the day following release from active duty" as the day of recommencement of disability compensation, as would a section comparable to section 5112(b)(3), it also acts to forfeit benefits outside of a time period for an application, which is neither required nor suggested by the statute. Even if the Veterans Court correctly determined that the absence of a section comparable to section 5112(b)(3) for the recommencement of benefits indicates a gap in the statute, that gap in no way authorized the one-year forfeiture deadline in the regulation 3.654(b)(2).

e. The Regulation Is Not Consistent with the Statute Because it Substantively Alters Mr. Buffington's Entitlement to Disability Compensation by Creating an Exception to the Requirement in Section 1110 that the Secretary "Will Pay" Disability Compensation

Sections 1110 and 5304(c) together provide that VA "*will pay*" Mr. Buffington's disability compensation except during "any period for which [he] receives active service pay." 38 U.S.C. §§ 1110 and 5304(c) (emphasis added). That payment is mandatory. *See UPS Customhouse Brokerage*, 575 F.3d at 1382 ("'Will' is a mandatory term, not a discretionary one.") As a result, absent regulation 3.654(b)(2), Mr. Buffington would have received his disability compensation except during "any period for which [he] receives active service pay." In particular, he would have received his disability compensation for the entire time period after which he was released active duty service in July 2005 until he served again in December 2009. Appx14-17.

Regulation 3.654(b)(2) thus substantively altered Mr. Buffington's entitlement to disability compensation with the result that the Secretary permanently withheld his disability compensation for almost three years—from July 2005 to February 2008. In effect, through the regulation, the Secretary created a new exception—beyond that created by the statute—to section 1110's directive that the Secretary "will pay" Mr. Buffington's disability compensation. This is not "consistent with" the statute.

f. The Age of Regulation 3.654(b)(2) Is Not Determinative

In addition to its other justifications, the Veterans Court noted that "despite ample opportunity to modify section 5304(c) or circumscribe this regulation, Congress has left both untouched for over half a century," relying on *Heino v. Shinseki*, 24 Vet. App. 367, 375 (2011). Appx12. There, however, the Veterans Court found it significant that after the Secretary had promulgated a regulation, Congress had twice amended portions of the statute, while not changing the specific portion of the statute pertaining to the regulation. It was therefore "reasonable to deduce that Congress agrees with the manner in which the Secretary is proceeding." *Id*. at 375-76. Here, by contrast, the statute has been "untouched." Appx12. In addition, the deduction of the Veterans Court in *Heino* was not the basis for the Veterans Court upholding the regulation and was not relied on by the Federal Circuit. *See Heino v. Shinseki*, 683 F.3d 1372, 1378-81 (Fed. Cir. 2012). Age, standing alone, is no justification for a regulation at odds with the language and intent of a statute. *See Barnhart v. Walton*, 212 U.S. 226 (2002) (Scalia, J., concurring, no "particular deference is owed to an agency interpretation of longstanding duration. That notion is an anachronism—a relic of the pre-Chevron days, when there was thought to be only one 'correct' interpretation of a statutory text.") (citations and internal quotations omitted).

2. Regulation 3.654(b)(2) Produces an Absurd Result

Regulation 3.654(b)(2) is also not based on a permissible construction of the statute because it produces an absurd result. Under the regulation, Mr. Buffington would have been entitled to a greater amount of disability compensation if he had never notified the VA of his return to active duty service at all.

Shortly after Mr. Buffington began serving on active duty in the Air National Guard in July 2003, he informed the VA of his return to active duty service by filing VA Form 21–8951. Appx1732-1733. As a result, VA terminated his disability compensation effective July 20, 2003, the day before his active duty service with the National Guard began. Appx1728-1730. He was released from his active duty service in July 2005. Appx514. Due to regulation 3.654(b)(2), the effective date of recommencement of his disability compensation was not until February 2008. Appx506-509, Appx1728-1730.

Mr. Buffington's situation is contrasted with that described in Board Docket No. 12-08 113 at 1–2 (Dec. 19, 2018). Appx191-192. There, a veteran who was receiving disability compensation returned to active duty service from September 2001 to August 2003. Appx191. Unlike Mr. Buffington, however, that veteran never informed the VA of her return to active duty service by filing VA Form 21–8951. Appx191. Having never informed the VA of her return to active duty service, the veteran also never informed VA of her release from active duty

service. Appx191. While VA recouped the disability compensation received by the veteran during her active duty service (that is, from September 2001 to August 2003), the veteran was permitted to keep her disability compensation immediately following her active duty service. Appx191-192. The result was that a veteran who never informed VA of her return to active duty service ended up receiving disability compensation for the period immediately after release from active duty service whereas a veteran who, like Mr. Buffington, informed VA of his return to active duty service and eventually informed VA of his release from such service is forever deprived of disability compensation for some of the period after release.

In at least this way, regulation 3.654(b)(2) produces an absurd result. Operation of the VA disability compensation system in which a veteran who fails to adhere to VA procedure fares better than one who does cannot be right. Indeed, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). *See also Pereira v. Sessions*, 138 S. Ct. 2105, 2116 (2018) ("'We are not willing to impute to Congress . . . such [a] contradictory and absurd purpose,' . . . particularly where doing so has no basis in the statutory text.") (quoting *United States v. Bryan*, 339 U.S. 323, 342 (1950)); *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1318 (2012) (finding at *Chevron* step two that a Treasury regulation was not a valid

exercise of rulemaking authority because it produced an absurd result). For this reason as well, regulation 3.654(b)(2) cannot be based on a permissible construction of the statute.

The Veterans Court recognized that this result could occur and justified it with the conclusory statement that the Secretary "is charged with managing compensation benefits for all veterans and the appellant has not demonstrated that it is unreasonable to craft rules with the expectation that they will be followed." Appx12. It is unreasonable, however, for the Secretary to craft rules resulting in a forfeiture of benefits to veterans who advise VA they are returning to active service and not to those who do not, especially when such forfeiture is neither required nor suggested in the statute.

As support, the Veterans Court cited *Mass Bd. of Ret. v. Muriga*, 427 U.S. 307, 314 (1976). Appx12. That case relates to whether a Massachusetts state law conflicted with the Fourteenth Amendment. *Id*. at 308. The statement in *Muriga* that "[p]erfection in making the necessary classifications is neither possible nor necessary," relied on by the Veterans Court, is irrelevant to whether the Secretary is authorized to issue a regulation that operates to forfeit disability compensation outside the period of active service. As noted by the dissent, the "Secretary has exceeded his statutory authority here at the expense of service-connected veterans who were called back to active duty." Appx18.

Because regulation 3.654(b)(2) exceeds the general rulemaking authority granted to the Secretary under 38 U.S.C. § 501 and produces an absurd result, it is not based on a permissible construction of the statute and, as such, is not entitled to any deference. The decision of the Veterans Court should therefore be reversed.

VII. CONCLUSION

The time bar in 38 C.F.R. § 3.654(b)(2) is inconsistent with sections 1110, 5110, and 5304(c) of the statute and was not a valid exercise of the Secretary's rulemaking authority under section 501. The decision of the Veterans Court should be reversed.

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Respectfully submitted,

/s/ Doris Johnson Hines

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