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.

REPLY BRIEF OF CLAIMANT-APPELLANT THOMAS H. BUFFINGTON

DORIS JOHNSON HINES
A. GRACE MILLS
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Avenue, NW,
Washington, DC 20001-4413
(202) 408-4000

BARTON F. STICHMAN
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1600 K Street NW, Suite 500
Washington, DC 20006
(202) 621-5677

Attorneys for Claimant-Appellant Thomas H. Buffington

January 27, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2020-1479

Short Case Caption Buffington v. Wilkie

Filing Party/Entity Thomas H. Buffington

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: January 27, 2021 Signature: /s/ *Doris Johnson Hines*

Name: Doris Johnson Hines

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.	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.
Thomas H. Buffington	None	None

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Stacy A. Tromble		

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☒ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable ☐ Additional pages attached

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Regulations

Other Authorities

I. INTRODUCTION

The Secretary does not dispute that section 1110 directs that the United States "will pay to any veteran" disability compensation he has earned. The Secretary does not dispute that section 5304(c) identifies an exception, stating that disability compensation "shall not be paid" "for any period for which such person receives active service pay." While the Secretary does not articulate a clear and unambiguous position on what "any period" means in section 5304(c), that language carves out a singular and express exception to when disability compensation "will be paid," starting when active-duty service recommences and ending when active-duty service concludes. Because the filing-date forfeiture provision in regulation 3.654(b)(2) conflicts with the directives in sections 1110 and 5304(c), under *Chevron* step one, it is invalid.

Recognizing the singular and express exception in section 5304(c) is not, as the Secretary contends, reading the word "only" into the statute. Instead, it recognizes the statutory text exactly as written. Congress's express inclusion of a discontinuance date cannot change the meaning of "any period" or the fact that Congress provided a singular and express exception in section 5304(c). The doctrine against superfluity, relied on by the Secretary, cannot change the express meaning of the statute. Nor does Congress's failure to expressly state a recommencement date mean that there is a gap in the statute. The plain meaning of

"any period" in section 5304(c) is that discontinuance runs with the start and end of active-duty service. This is consistent with the stated purpose of section 5304(c), prohibiting dual compensation. And significantly, in other places in the statute, Congress expressly enacted filing-date forfeiture provisions, but did not with respect to recommencement following a period of return to active service. That Congress has shown that it knows how to adopt filing deadline forfeiture provisions elsewhere but did not for the conclusion of a return to active-duty service precludes the Secretary from unilaterally effecting a recommencement forfeiture.

While Mr. Buffington contends that the language of the statute is clear, the failure of the Veterans Court and Secretary to articulate a clear and unambiguous definition of "any period" in section 5304(c) suggests that, in their view, the statute is ambiguous. The pro-veteran canon requires that such ambiguity be resolved in Mr. Buffington's favor and the filing date forfeiture provision invalidated.

Regulation 3.654(b)(2) also fails at *Chevron* step two. While the Secretary contends that he has broad discretion to create reasonable restrictions for the purposes of systemic order and efficiency, the one-year deadline in regulation 3.654(b)(2) does not promote the stated purpose of section 5304, to prohibit the duplication of benefits. It is thus not necessary or appropriate under section 501.

The Secretary does not dispute that application of the regulation to veterans like Mr. Buffington produces the 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. That absurd result supports that regulation 3.654(b)(2) is arbitrary and capricious and thus invalid.

This Court should 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.

II. ARGUMENT

A. There Is No Gap in the Statute

1. The Statutory Language Demonstrates There Is No Gap

a) The Language Is Clear and Unambiguous

While the Secretary contends that Mr. Buffington's interpretation of section 5304(c) is wrong, Sec'y Br. at 13 (contentions "premised on a misconstruction of the statute"); Sec'y Br. at 26 (contention "premised on Mr. Buffington's incorrect interpretation of the statute"), he does not articulate a clear and unambiguous position on how to interpret Congress's words that the VA may not pay compensation "for any period" of active military service in section 5304(c). Sec'y

Br. 13-21. Nor did the Veterans Court majority directly address this point. Appx8-9.[1]

The statute is clear, however, that the United States "will pay" disability compensation, a point the Secretary does not contest, Sec'y Br. at 14 (section 1110 "establishes the general requirement that the United States 'will pay' disability compensation,") and provides an exception to that payment during "any period" of active-duty service, another point the Secretary does not contest, Sec'y Br. at 13 (section 5304(c) "establishes an unequivocal bar to dual compensation").

The plain meaning of sections 1110 and 5304(c) is that compensation runs parallel to the "period" of service: stopping on re-entry to active military service and restarting at discharge from active military service. 10 U.S.C. § 12316, cited by the Veterans Court, Appx7, is consistent in recognizing that a "period" has a beginning and an end, providing that a member of a Reserve receiving disability compensation and called to active duty "ceases to be entitled to th[ose] payments because of his earlier military service until the period of active duty ends."

The Secretary contends, however, that it "does not follow—and Congress did not provide—that a veteran's disability benefits *must* resume on the earliest possible effective date in every instance." Sec'y Br. at 17. But by the mandate to

[1] The dissent did, stating that the "statute already delineates the period for which veterans may not receive VA benefits - while on active duty. Appx18.

pay in section 1110 and by "any period" in section 5304(c) defining a start and stop of active service, the statute specifically directs when payment is owed and when it is not.

Instead of directly addressing the meaning of "any period" in section 5304(c), the Secretary contends that Congress chose not to specify the effective date of recommencement of disability benefits following a veteran's period of active service, and contrasts that with its definition of the effective date of the discontinuation of benefits in section 5112(b)(3). Sec'y Br. at 14. That Congress separately defined an effective date of discontinuation in section 5112(b)(3) does not mean, however, that Congress did not speak to the separate issue of when benefits recommence. To the contrary, Congress did speak to the issue by stating that the United States "will pay" a veteran disability compensation in section 1110 and identifying a single carve-out for "any period for which such person receives active service pay" in section 5304(c). The term "any period" should be given its clear and unambiguous meaning of when the veteran was in active service. The Secretary, by contrast, suggests that "any period" means whatever the Secretary wants it to mean, even though Congress did not provide any limiting definition of "any period." Allowing the Secretary to avoid a clear and unambiguous construction of "any period" and then to promulgate a filing date forfeiture in regulation 3.654(b)(2), would allow the Secretary to effect forfeiture in

circumstances beyond merely prohibiting the duplication of compensation payments while the servicemember was receiving active duty pay, Opening Br. 28, a point the Secretary does not contest.

b) That Section 5304(c) Provides a Singular and Express Exception Is Not Reading Language into the Statute

The Secretary argues that Mr. Buffington's interpretation "inserts limiting language that is not present in the statute." Sec'y Br. at 16. Recognizing the singular and express exception to the receipt of disability benefits in section 5304(c), however, is not adding the word "only" to the statute; it is a simple recognition that section 5304(c)'s identification of "any period for which such person receives active duty pay" defines when disability compensation will not be paid.

The Secretary states that it "is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" Sec'y Br. at 16, citing *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (quoting *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (in turn quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* at 94)).

In *Little Sisters*, the question was whether an agency could promulgate rules providing religious and moral exemptions to the contraceptive mandate in the Affordable Care Act. 148 S.Ct. at 2379. In answering that question in the

affirmative, the Court noted that the statute granted "sweeping authority" to the agency to craft "comprehensive guidelines" for preventive care because the statute was "completely silent" on what the guidelines had to contain or how the agency would go about creating them. *Id*. at 5380. This expansive language gave "no indication whatever" that the agency was limited in what it could designate as preventive care. *Id*. at 5381. In that context, the Court concluded that "absent provisions cannot be supplied by the courts," noting that this applied to "terms not found in the statute" and "limits on an agency's discretion that are not supported by the text." *Id*.

Here, however, there is no "sweeping authority" granted to the Secretary regarding whether and how to effectuate forfeiture of disability benefits *outside of* any period of active duty. Instead, section 5304(c) supports the opposite by identifying the discontinuance period as any period of active duty.

In *Rotkiske*, also relied on by the Secretary, the issue was not whether a sweeping grant of authority allowed an agency to craft certain rules, but whether the court should read into a statute a provision stating that a limitations period begins on the date a violation is discovered. 140 S.Ct. at 358. The Court declined that interpretation, stating that it "is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by courts." *Id*. at 360-61. Here, by contrast, Mr. Buffington does not ask for language to be read into the

statute, but instead urges that the singular and express exception to the receipt of benefits in section 5304(c) be recognized.

Finally, while urging the proposition that "absent provisions cannot be supplied by the courts," Sec'y Br. at 16, the Secretary fails to recognize that this is just what he is advocating by asserting the authority to include a provision in regulation 3.654(b)(2) effecting a forfeiture of disability compensation outside of "any period for which [a veteran] receives active duty pay," which is inconsistent with section 5304(c) and other statutes effecting forfeiture in different circumstances.

2. The Discontinuance Date in Section 5112(b)(3) Does Not Create a Gap in Section 5304(c)

The Secretary argues that the definition of the effective date of the discontinuation of benefits in 38 U.S.C. § 5112(b)(3), without a separate definition of the effective date of recommencement, means there is a gap in the statute. Sec'y Br. at 14. As support, the Secretary quotes the statement that "[I]n general, 'a matter not covered is to be treated as not covered" from Scalia & Garner's text, *Reading Law: The Interpretation of Legal Texts* 93 (2012), which was quoted in *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020). Sec'y Br. at 14-15.

In explaining the "omitted-case canon" from which the Secretary quotes, Scalia & Garner state that courts should not "elaborate unprovided-for exceptions

to a text," noting that Justice Blackmun stated as a circuit judge that "[I]f Congress [had] intended to provide additional exceptions, it would have done so in clear language." *Reading Law* at § 8, citing *Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting).

In arguing that the statute's silence on a specific date for recommencement means that the text supports restrictions on recommencement, the Secretary advocates for exactly what Scalia & Garner warn against. Section 5304(c) provides a singular and express exception to benefits as "any period for which such person receives active duty pay." Consistent with the doctrine Secretary relies on, if Congress had intended to provide additional exceptions, "it would have done so in clear language." *Reading Law* at § 8.

The case the Secretary relies on, *GE Energy*, is wholly different from the situation here. In *GE Energy*, the Court considered whether domestic equitable estoppel applied to the Convention on the Recognition of Foreign Arbitral Awards. *GE Energy*, 140 S.Ct. at 1642. The Court recognized that the Convention was "simply silent" on the application of estoppel, stating that this silence was dispositive "because nothing in the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines." *Id*. at 1645. Therefore, the Convention's silence on the application of equitable estoppel did not mean that equitable estoppel was excluded from the Convention. Here, in contrast to *GE*

Energy, section 5304(c) is not "simply silent," but provides the timing parameters of discontinuance as "any period" of active duty.

The Secretary postulates that Congress's decision to not include separate statutory provision on the recommencement date "likely reflects the commonsense conclusion that recommencing benefits is a more substantive process than stopping a running award and could require evaluation of the state of the veteran's disability following a new period of active duty - and that VA, as the agency charged with administering the statutory scheme, is in the best position to develop such procedures pursuant to its authority under 38 U.S.C. § 501(a)." Sec'y Br. at 15. The Secretary's speculation, however, is inconsistent with the "any period" language in section 5304(c) and is inconsistent with the statute's expressly stated purpose, the prohibition on duplication of benefits. Further, it is not Mr. Buffington's position, as the Secretary recognizes, Sec'y Br. at 23, n.5, that the Secretary cannot create processes for the resumption of benefits. The Secretary's reference, therefore, to "evaluation of the state of the veteran's disability following a new period of active duty" is a red herring. What the Secretary was not authorized to do was to effect a forfeiture of Mr. Buffington's benefits based solely on a filing date provision inconsistent with the statute.

3. The Canon Against Surplusage Cannot Supplant the "Any Period" Language in Section 5304(c)

The Secretary argues that Mr. Buffington's interpretation would render "section 5112(b)(3) superfluous," contending that "the canon against surplusage requires courts to avoid an interpretation that results in portions of text being read as meaningless." Sec'y Br. at 18.[2]

The Supreme Court addressed the canon of superfluity in *Microsoft Corp. v. i4i Ltd.*, 564 U.S. 91 (2011). In finding the language in 35 U.S.C. § 282, providing that "[a] patent shall be presumed valid," imposes a heightened standard of proof on the patent challenger, the Court concluded that it "alone suffices to establish that the defendant bears the burden of persuasion." *Id*. at 106. This was true notwithstanding the statute's additional statement that "[t]he burden of establishing invalidity of a patent . . . shall rest on the party asserting such invalidity." *Id*. The Court noted that the canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute but found that "no interpretation of section 282 avoids excess language." *Id*. As the Court in *Microsoft* recognized, "[t]here are times when Congress enacts provisions that are

[2] The Secretary relies on *Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009) for the canon against surplusage, Sec'y Br. at 18, but does not address (or rebut) that in *Sharp*, this Court rejected the government's proposed statutory interpretation, which made it "effectively impossible" to obtain the benefit of a specific statutory provision. This is not the situation here. Opening Br. at 21-22.

superfluous," *quoting Corley* v. *United States*, 556 U.S. 303, 325 (2009) (Alito, J., dissenting), and that this "kind of excess language" "is hardly unusual." *Id*. at 107.

The same is true here. The Secretary's apparent, but unstated, construction of "any period" in section 5304(c) is when a veteran receives active service pay. Sec'y Br. 13. It is bounded by when active duty starts and when it ends, as seemingly confirmed by the Secretary's recognition that section 5304(c) establishes "an unequivocal bar to dual compensation" during active duty. *Id*. The Secretary's apparent interpretation of "any period" as having a start and an end does not, as in *Microsoft*, avoid the excess language in section 5112(b)(3) and thus does not avoid superfluity.[3] Appx18, dissent, ("The statute already delineates the period for which veterans may not receive VA benefits – while they are on active duty. 38 U.S.C. § 5304(c).")

Further, as the Court noted in *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 2011), "the rule against giving a portion of text an interpretation which renders it superfluous does not prescribe that a passage which could have been more terse does not mean what it says. The rule applies only if verbosity and prolixity can be

[3] As Mr. Buffington noted in his opening brief, section 5112(b)(3) establishes discontinuance the day before active duty, as opposed to the date of active duty, Opening Br. 20, meaning that the date of discontinuance in section 5112(b)(3) is not superfluous. To the extent the Secretary argues that this is a difference without distinction, any interpretation of "any period" in section 5304(c) renders the start date in section 5112(b)(3) superfluous.

eliminated by giving the offending passage, or the remainder of the text, a competing interpretation." As in *Bruesewitz*, that is not the case here. The statute provides the start of discontinuance of benefits in section 5112(b)(2) "independent meaning," but "only at the expense" of rendering "any period for which such person receives active duty pay" in section 5304(c) meaningless.

Finally, consistent with *Microsoft* and *Bruesewitz*, the Scalia & Garner text, *Reading Law*, which the Secretary repeatedly relies on, Sec'y Br. at 15, 16, cautions that the surplusage canon is not absolute. *Reading Law* at § 26. Instead, "a court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage" because sometimes "drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." *Id*.

The canon against superfluousness cannot change that "any period" in section 5304(c) establishes a start and an end of discontinuance of disability compensation. That period should be given effect and the portion of regulation 3.654(b)(2) negating that period should be invalidated.

4. Congress Knew How to Effect Forfeiture Based on Filing Requirements, but Did Not Do So Here

The Secretary contends that "although Congress made certain provisions regarding effective dates of awards in section 5110, Congress did not address

recommencement of a veteran's service-connected disability benefits following a veteran's period of active-duty service," noting only that "[c]ertain provisions allow for an award that is earlier than the date of receipt of the application." Sec'y Br. at 14 and 14, n.2. The effective date provisions in section 5110, however, not only allow for an award that is earlier than the date of receipt of an application, but also effect forfeiture if an application is not filed within a one-year period. *See, for example*, 38 U.S.C. § 5110(b)(1) ("The 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"); *see also* Opening Br. at 24-25 (identifying statutory provisions with date restrictions) and Sec'y Br. at 25 (recognizing that Congress provided by statute one year for a veteran to file a claim following discharge but did not provide such a limitation on recommencement). As the Supreme Court recognized in *Rotkiske*, on which the Secretary relies, Sec'y Br. at 16, a textual judicial supplementation, here, allowing the Secretary to effect forfeiture in other circumstances, is particularly inappropriate when "Congress has shown that it knows how to adopt the omitted language or provision." 140 S.Ct. at 369.

Congress has shown that here, specifically enacting forfeiture provisions based on filing deadlines in other circumstances, but not for the recommencement of benefits following any period of active-duty service. The Secretary should not

be permitted to effect forfeiture when Congress specifically did in other circumstances but not here.

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

The Secretary contends that the pro-veteran canon "is not at issue in this appeal because there is no textual ambiguity to resolve." Sec'y Br. at 28. Mr. Buffington contends that the statute is clear and demonstrates that the filing-date forfeiture effected by regulation 3.654(b)(2) is improper because it is inconsistent with the statute. However, neither the Veterans Court nor the Secretary identify a clear and unambiguous interpretation of "any period" in the statute, instead asserting that Mr. Buffington's interpretation is wrong. Appx7-8; Opening Br. at 13, 26. This failure supports that, in the view of both the Secretary and the Veterans Court, there is some textual ambiguity regarding whether "any period" in section 5304(c) identifies the beginning and end of active-duty service as the period of discontinuance. To the extent there is an ambiguity with respect to the interpretation of "any period," the pro-veteran canon demands a construction in the veteran's favor to preclude a filing date forfeiture. *Kirkendall v. Dep't of Army*, 479 F.3d 830, 846 (Fed. Cir. 2007) (pro-veteran canon "operate[s] to rebut or eliminate otherwise fair readings in close cases").

The Veterans Court did not address, or even mention, the pro-veteran canon in its decision. Appx2-18. In response to Mr. Buffington's argument that the pro-

veteran canon takes precedence over deference to VA, Opening Br. at 27, the Secretary contends that the canon does not "preclude VA from resolving statutory ambiguities in a manner that might be characterized as adverse to certain veterans as long as its interpretation is reasonable" and is considered "only after considering agency deference," Sec'y Br. at 33, essentially neutering the canon entirely.

The pro-veteran canon, however, is a mandate that "*any* room for interpretive doubt . . . must be resolved in the veterans' favor." *Carpenter v. Principi*, 15 Vet. App. 64, 76 (2001) (overruled in part on other grounds by *Ravin v. Wilkie*, 31 Vet. App. 104 (2019)) (emphasis added); *see also Robinette v. Brown*, 8 Vet. App. 69, 78 (1995) ("[I]f there is any ambiguity in the text, the statute must be interpreted in the veteran's favor"); *Viegas v. Shinseki*, 705 F.3d 1374, 1380 (Fed. Cir. 2013) ("[I]f there is any ambiguity regarding the prerequisites for compensation . . . interpretive doubt must be resolved in the veteran's favor"). The pro-veteran canon, therefore, goes beyond serving as a mere interpretive rule of thumb. If Congress contemplates an outcome adverse to veterans otherwise owed benefits, it must say so unequivocally; if the statute is ambiguous, the pro-veteran canon prevails. And in evaluating the background and purpose of legislation about veterans, courts "presume congressional understanding" of the pro-veteran canon. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). In other words, "[i]f [] statutory ambiguity is to be resolved against [] a veteran, it is Congress, not VA or

[a] Court, that must do so." *Cottle v. Principi*, 14 Vet. App. 329, 336 (2001). For these reasons, the pro-veteran canon is a traditional canon of statutory interpretation applied at Step 1 of *Chevron* and should always trump deference to the agency. *See Procopio v. Wilkie*, 913 F.3d 1371, 1383-84 (Fed. Cir. 2019) (O'Malley, J., concurring) ("when interpreting such statutes, or regulations promulgated thereunder, we may not resort to agency deference unless, after applying the pro-veteran canon along with other tools of statutory interpretation, we are left with an unresolved ambiguity").

The pro-veteran canon supports that the forfeiture effected by regulation 3.654(b)(2) should be found invalid because it effects an absolute reduction in benefits for VA's administrative convenience at the expense of benefits to which VA has already determined a veteran may otherwise be entitled when Congress did not unequivocally contemplate an outcome adverse to veterans otherwise owed benefits.

C. Regulation 3.654(b)(2) Is Not a Valid Exercise of the Secretary's Rulemaking Authority

The Secretary recognizes that the purpose of Section 5304(c) is to prohibit the concurrent receipt of benefits. Sec'y Br. at 16. The Secretary does not disagree, however, that the one-year time bar in regulation 3.654(b)(2) is inconsistent with that purpose. Sec'y Br. 24. In response to Mr. Buffington's argument that "the regulation's effective date provisions" are "irrelevant to any duplication of

benefits," the Secretary contends that he has "broad discretion" "to create reasonable restrictions" for the purposes of "systemic order and efficiency." Sec'y Br. at 24. The one-year deadline in regulation 3.654(b)(2), however, does not promote the stated purpose of section 5304, to prohibit the duplication of benefits, and thus is not necessary or appropriate under section 501. The regulation therefore exceeds the authority granted to the Secretary in section 501 to "prescribe all rules and regulations which are necessary or appropriate to carry out" the statute.

The Secretary also leans heavily on his convenience in administering the VA benefits system as justification for engrafting forfeiture on section 5304(c) where none exists in the statute. Sec'y Br. at 21-24. The Secretary's convenience, however, cannot supplant the statute. Indeed, the Secretary specifically recognizes that forfeiture is effected by statute in other situations, recognizing that regulation 3.654(b)(2) is "*comparable* to other one-year deadlines in the veterans' benefits scheme." Sec'y Br. at 25 (emphasis added); see also *id*., noting that "a one-year time limit is generally used throughout title 38." That the Secretary rightly characterizes the forfeiture in regulation 3.654(b)(2) as comparable to *other* statutory provisions is a telling recognition that the *other* deadlines effecting forfeiture were enacted in the statute by Congress while the forfeiture deadline is regulation 3.654(b)(2) was not.

The Secretary also references *Jernigan v. Shinseki*, 25 Vet. App. 220 (2012) as "an example of a previous instance in which the Veterans Court upheld a time limit for filing a claim." Sec'y Br. at 25-26. There, too, however, the time limit was supported by the statute, a point Mr. Buffington made in his opening brief, Opening Br. at 34-35, but which the Secretary does not substantively rebut.

Likewise, the Secretary's doomsday scenario that a veteran may wait 20 years before requesting recommencement, Sec'y Br. at 23, n.5, does not render the forfeiture provision in regulation 3.654(b)(2) consistent with the statute or any less unreasonable. By its terms, the statute does not permit the Secretary to engraft a forfeiture where none exists and it was unreasonable for the Secretary to do so. And for the limited number of veterans receiving disability compensation who return to active service in support of our country—something for which they should be praised, not penalized—VA can accept some responsibility to ensure that their disability benefits are recommenced in a timely way if VA wants to avoid unnecessary work.

Relying on *Hettleman v. Bergland*, 642 F.3d 63 (4th Cir. 1981), the Secretary contends that "the government has an interest in seeing that the program it administers runs efficiently; . . . and the Secretary, as the head of the responsible agency, is in the best position to promulgate uniform procedures." Sec'y Br. at 23-24. *Hettlemen*, however, addressed whether, by regulation, a state could be subject

to strict liability under the Food Stamp Act for the loss of food stamp coupons, 642 F.3d at 64, which was not inconsistent with the statute. The Secretary also cites *Veterans Justice Group v. Secretary of Veterans Affairs*, 818 F.3d 1336, 1351 (Fed. Cir. 2016) for the proposition that this Court has recognized that "VA is in a better position than this court to evaluate inefficiencies in its system." Sec'y Br. at 24. That case, however addressed whether VA could implement standard claims forms, not whether the Secretary can effect a forfeiture of previously-granted benefits. The dispute here, by contrast, does not involve claims forms, but the forfeiture effected by the regulation.

The Secretary also blames Mr. Buffington for not filing for recommencement sooner, stating that "Mr. Buffington's delay in applying for recommencement does not render section 3.654(b)(2) unreasonable or contrary to law." Sec'y Br. at 26-27. Mr. Buffington does not contest that VA can require him to apply for recommencement. That is beside the point. What Mr. Buffington contests is the forfeiture of benefits unilaterally created by the Secretary and inconsistent with the statute.

D. Regulation 3.654(b)(2) Is Arbitrary and Capricious

The Secretary notes that the applicable standard for a regulation is "merely reasonableness," quoting *Sears v. Principi*, 349 Fed. 3d 1330, 1332 (Fed. Cir. 2003). Sec'y Br. at 27. In *Sears*, however, this Court noted that the relevant

regulation did "not conflict with the spirit of the veterans' benefits scheme in any substantial way." *Id*. Here, regulation 3.654(b)(2) conflicts with the statute, which provides for discontinuance for any period of active service and does not provide for filing date forfeiture, where that is specifically provided in other circumstances. Regulation 3.654(b)(2) further conflicts with the spirit of the veterans' benefits scheme. Through its timing provision, the regulation punishes veterans who return to active service by restricting the disability benefits they have earned if the veteran does not ask to receive them again within a set period of time even when there is no question that the veteran continues to be entitled to those benefits and is not receiving active duty pay, thus not running afoul of the statute.

While the Secretary suggests that VA will undertake a disability evaluation when a veteran requests reinstatement of previously-granted disability benefits, Sec'y Br. at 25, n.3 ("a veteran's delay could lead to VA having to expend disproportionate claims processing resources on a single claim"), and Sec'y Br. at 26-27 ("a veteran's failure to promptly apply for recommencement could affect the amount of disability compensation the veteran may ultimately receive"), the Secretary points to no statutory obligation for VA to reassess previously-granted disability benefits suspended when a veteran returns to active service. *See also* Sec'y Br. 24-26, noting Mr. Buffington's arguments at Opening Br. 37-38 regarding processes VA *may* implement, but not substantively responding. *See also*

Appx11. That VA may reassess disability compensation following a period of active-duty service does not grant the Secretary *carte blanche* to effect forfeiture of benefits to which the veteran is otherwise entitled.

The Secretary also predictably argues that regulation 3.654(b)(2) is not arbitrary and capricious because there may be "cases in which the regulation, as applied to the particular facts of the case, 'does not produce the most desirable result.'" Sec'y Br. at 27; *see also* Appx6. That is not the situation here. To avoid duplication of benefits, Mr. Buffington told VA he was returning to active duty. He was then penalized when he did not tell VA soon enough that his active duty had ceased. Appx6. Instead, while such veterans must return any duplicative payments, they are entitled to the correct and limited discontinuance for just any period of active-duty service. Appx6 (noting Board decisions reflecting that "VA may recoup the compensation benefits to which the veteran was not entitled, i.e., for the period beginning on entry to active service and ending upon the release from active duty.")

This is not a situation in which the regulation does not produce the most desirable result in every circumstance; it is that operation of the regulation prefers those who receive duplicative benefits over those who do not. That systemic bias demonstrates that regulation 3.654(b)(2) is arbitrary and capricious.

III. CONCLUSION

The forfeiture effected by the filing date requirement in 38 C.F.R. § 3.654(b)(2) is inconsistent with 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.

Date: January 27, 2021

Respectfully submitted,

/s/ Doris Johnson Hines

Doris Johnson Hines
A. Grace Mills
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Avenue, NW
Washington, DC 20001-4413
(202) 408-4000

Barton F. Stichman
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1600 K Street NW, Suite 500
Washington, DC 20006
(202) 621-5677

Attorneys for Claimant-Appellant
Thomas H. Buffington

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(a) or Federal Circuit Rule 28.1:

> This brief contains 5065 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Circuit Rule 28.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6):

> This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

Date: January 27, 2021 /s/ Doris Johnson Hines

Doris Johnson Hines
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Avenue, NW
Washington, DC 20001-4413
(202) 408-4000