2020-1647

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GARY R. LARSON,
Claimant - Appellant

v.

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

Appeal from Memorandum Decision
U.S. Court of Appeals for Veterans Claims
Cause No. 17-0744
Judge Amanda L. Meredith

APPELLANT'S PRINCIPAL BRIEF (CORRECTED)

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2020-1647

Short Case Caption Larson v. Wilkie

Filing Party/Entity Gary R. Larson, Appellant

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: 09/07/2020

Signature: /s/ Chris Attig, Attorney

Name: Chris Attig, Attorney

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

☐ Additional pages attached

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).

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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).

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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

N/A		

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

CASES

CAVC MEMORANDUM DECISIONS

STATEMENT OF RELATED CASES

Mr. Larson has no related cases at the CAVC or before this Court. He is not aware of any appeals before the U.S. Court of Appeals for the Federal Circuit whose outcome may affect his appeal.

JURISDICTION

The Board of Veterans Appeals (BVA), which had jurisdiction pursuant to 38 U.S.C. §7104(a), issued its final decision on December 8, 2016. Appx17-33. Mr. Larson timely appealed to the U.S. Court of Appeals for Veterans Claims (Veterans Court) on March 16, 2017. Appx36. In a single-judge memorandum decision on April 16, 2019, the Veterans Court held that it lacked jurisdiction pursuant to 38 U.S.C. §7252(b). Appx1-12. On September 19, 2019, the Veterans Court denied reconsideration and panel review. Appx14-15. On December 18, 2019, the Veterans Court declined *en banc* review. Appx16. The judgment of the Veterans Court issued, and its decision became final, on December 18, 2019. Appx13. Mr. Larson timely appealed to the Court on February 13, 2020. Appx38.

The issues on appeal are entirely issues of law. The Court has jurisdiction to conduct *de novo* review of a question of law, namely the Veterans Court's compliance with its jurisdictional statute. *Wanner v. Principi*, 370 F.3d 1124, 1128 (Fed. Cir. 2004). The Court also has jurisdiction to review whether the Veterans Court "misinterpreted our rulings in earlier decisions on an issue of law." *Moody v. Principi,* 360 F.3d 1306, 1310 (Fed. Cir. 2004).

STATUTE AT ISSUE

38 U.S.C. §7252

JURISDICTION; FINALITY OF DECISIONS.

(a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

(b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.

(c) Decisions by the Court are subject to review as provided in section 7292 of this title.

STATEMENT OF THE ISSUES

ISSUE #1

Did the Veterans Court err when it expanded the prohibition against judicial review of the VA Schedule of Rating Disabilities in 38 U.S.C. §7252(b) to encompass a BVA decision that obesity and Dysmetabolic syndrome (DMS) could not be disabilities under 38 U.S.C. §1110?

STATEMENT OF THE CASE

Mr. Larson suffers rapid and sustained weight gain during and following his deployment to Desert Storm.

When Mr. Larson took his Navy enlistment physical in 1987, he was 5'8" tall, 179lbs – a "medium" build. Appx378-379. He had a "very healthy weight." Appx441. When he went on active duty in 1988, he was only 187 lbs, with 10-percent body fat. Appx330. 5 years later, when he left active duty, he weighed between 245 and 250 lbs, with 26-percent body fat, his build described as "heavy". Appx330, 1496. Contemporaneous pictures reflect these measurements, and the changes to Mr. Larson's body over time. Appx80-82. In 2007, shortly before he filed a VA claim to service connect his obesity and

dysmetabolic syndrome ("DMS"), he was diagnosed with morbid obesity, weighing 331 lbs. Appx321-322.

What might have frustrated Mr. Larson the most was not just that the weight gain wasn't his fault, but also that nothing seemed to slow or stop it. The rapid and sustained weight gain which started in the Navy continued "despite increased frequency of exercise and close monitoring of nutrition." Appx332; Appx348.

Mr. Larson is no stranger to physical fitness, holding a B.S. in Exercise and Sports Science, and a Masters in Exercise Science and Health Promotion. Appx47; Appx131-132 He had studied anatomy, physiology, and endocrinology. Appx131. He is a personal trainer specializing in, among other things, injury prevention and weight loss. Appx132.

In April 1989, his 1.5 mile run time was 10:30, a brisk 7 minutes per mile. Appx383. Before deploying to Desert Storm from August 10, 1990, to March 15, 1991, he could run 3 miles in 21 minutes. Appx208; Appx427. By June 1990, shortly after completing a 6-month malaria vaccination regimen, his 3-mile run time dropped to 27:03 minutes (9 min/mile). Appx381. And when he returned from Desert Storm, "all of

sudden" he couldn't finish the 3-mile run. Appx427; Appx313. By September 1991, Mr. Larson failed to meet the Navy's body fat requirements. Appx391. By November 1992, the Navy classified him as obese. Appx389.

Mr. Larson tried to attack the weight "as anybody else would," with diet and exercise. Appx427-428. In May 1991, for example, he biked 50 miles per week, also performing several hundred trunk twists, sidebends, and crunches. Appx385. In December 1991, his military dietitian put him on a 1,500 daily calorie diet, rationing those sparse calories across protein, fat and carbohydrates. Appx358. In early 1992, he biked 61 miles in a week. Appx377. After Desert Storm, Mr. Larson "spent the rest of [his] navy career on a weight control program as well as a remedial physical fitness program," seeing "nearly no improvement." Appx313.

After leaving active duty in February 1993 (Appx18; Appx 161) Mr. Larson's weight gain was as unrelenting as his attempts to forestall it. His wife – herself an athlete – describes her husband pulling out all the stops to control his weight, including designing meal plans, putting together exercise programs, and two hours of exercise a day. Appx444-

445. By August 2006, he was doing cardio 2 days a week, and lifting weights 3 days a week. Appx322. A month later, he was focused on burning 1000 calories at the gym, 5 days a week. Appx323. By December 2006, he was not eating for pleasure and worked out "5-6 days per week, alternating resistance with cardio for about a 1 hour workout." Appx325. His goal in 2010 remained burning 1000 calories/day with exercise. Appx405-406. That year, he even joined an "[i]ntensive 10 day weight management program" Appx409-410; Appx411-414.

Ultimately, his doctor diagnosed him with a bevy of medical conditions: (hypogonadism, hypothyroidism), but his diagnoses of DMS and obesity are central to this appeal. Appx294. DMS is referenced interchangeably as DMS, metabolic syndrome X (Appx24), and insulin resistance. Appx24; Appx291. DMS is an "association of impairments that can appear simultaneously or gradually in the same individual," seemingly caused by associating lifestyle (genetic and environmental factors) with insulin resistance. Appx638-656. Dr. Milici's article was not in the record before the BVA or the Veterans Court, and is included here only to aid the Court in understanding the general nature of DMS.

One thing about Mr. Larson's DMS and obesity are largely undisputable: his rapid and sustained weight gain began in a short time period on active duty, when his "[w]eight increased approximately 40 lbs while in Persian Gulf." Appx348. Mr. Larson traced his obesity to his "gulf war" service, saying "I went over there wearing a size medium uniform and came back wearing a 2XL." Appx427; Appx407-410. He believed the weight gain and obesity was related to his exposure to a variety of environmental toxins, including oil, smoke, pyridostigmine bromide (a nerve agent antidote used during the Gulf War), anthrax vaccine with squalene, six months of weekly 300 mg cloroquin dose (October 1989 – April 1990), and pesticides used to kill sand fleas. Appx209; Appx 217-221; Appx231-237; Appx245-247; Appx284; Appx313; Appx367; Appx395; Appx407-410. The VA generally recognizes environmental exposures in Southwest Asia "may be associated with disturbances of … the neuroendocrine system." Appx223. One VA doctor opined that "in general the [ ] association is possible," but concluded there was no specific relationship between Mr. Larson's service, DMS and obesity. Appx 153-155. The opinion lacks a useful medical rationale or analysis. *Id.* This doctor later provided an

addendum opinion that does not mention or consider the rapid spike in Mr. Larson's weight after Desert Storm. Appx83-88; Appx156-159. The following chart, and its supporting evidence, show the rapid onset of Mr. Larson's weight gain in service, particularly during his time in Desert Storm from August 1990 to March 15, 1991. Appx657.

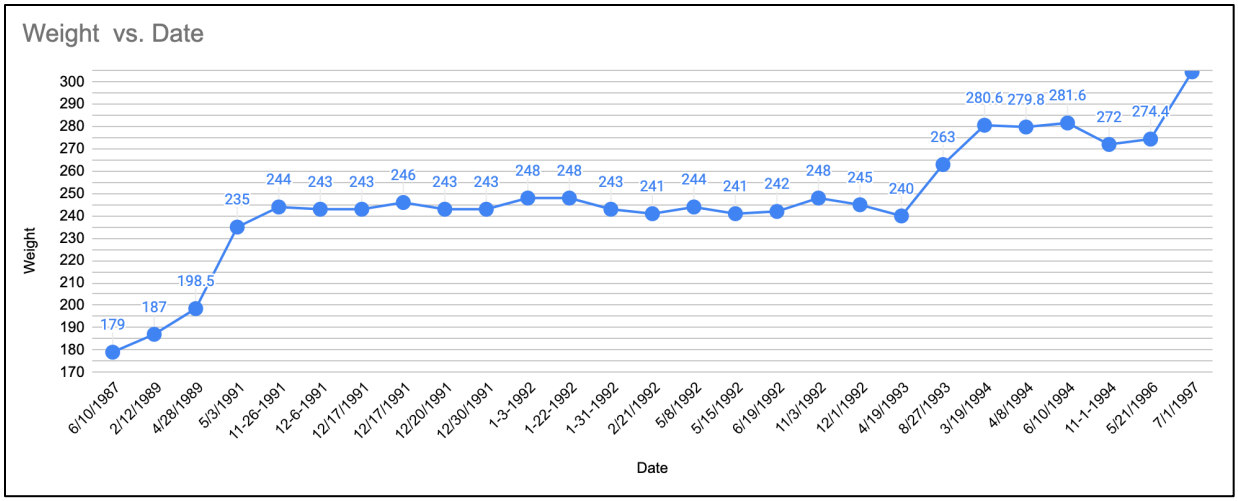

Figure 1 (Appx657)

Mr. Larson had a healthy weight when entered service in 1988. From October 1989 through April 1990, he took 300 mg weekly doses of cloroquin for 6 months, to vaccinate against malaria. Appx367-368. His weight started to spike in May 1991, two months after returning from Desert Storm. Appx384. He was diagnosed as overweight in November 1991. Appx211. By the time he left service, he weighed 248 lbs and was

classified as obese. Appx3294. By July 2014, he was morbidly obese with a BMI of 48.5. Appx401-402.

Because the Court's decision in *Saunders* defining a disability as a functional impairment of earning capacity issued after the record in his case closed, Mr. Larson has not had the opportunity to develop the record with evidence showing the degree to which his obesity and DMS are functional impairments affecting his earning capacity. *Saunders* v. *Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018). The record does show that fatigue from his obesity and DMS left him always tired. Appx322. He held this fatigue at bay by using a prescription stimulant, "phentermine" which he took daily. Appx327. He had difficulty sitting or reading or working at a computer and became quite drowsy. Appx75. And he missed work for medical appointments with his endocrinologist. Appx294-295.

The VA denies service connection for Mr. Larson's weight gain and insulin resistance condition, holding that obesity and dysmetabolic syndrome are not disabilities.

In August 2009, Mr. Larson filed a claim to service connect 12 conditions, including hypothyroidism, hypogonadism, DMS, obesity, and a variety of conditions secondary to DMS and obesity (fatigue, edema,

skin tags, acanthosis nigricans, and striae). Appx298-320; Appx17-18; Appx29; Appx31.

Initially, a VA doctor in March 2010 concluded that Mr. Larson's hypogonadism and hypothyroidism were related to his exposure to environmental hazards overseas, but only noted his diagnosis with DMS. Appx288. Mr. Larson recalled that doctor saying "I do believe that it is clearly environmental and the time line of the symptoms began during your Military Service." Appx232. A second, subsequent opinion concluded Mr. Larson's "[d]ysmetabolic syndrome is not a specific constilation [sic] of symptoms," and unrelated to his military service. Appx272. The second doctor later provided a single statement opinion that the "VA/DOD enviormental [sic] health provider resource web site" showed no association of his conditions to service. Appx266; Appx269-270. Another VA doctor, in February 2014, provided a negative nexus opinion, that lacks useful analysis. Appx153-155

The Secretary denied service connection for obesity, DMS, and the conditions secondary thereto. Appx238-264. Mr. Larson appealed, including evidence supporting nexus, which the Secretary rejected. Appx232; Appx208-212; Appx213-216. The Secretary then issued a

Statement of Case ("SOC"), denying obesity because it was "not subject to compensation." Appx201. He concluded that DMS was a "known clinical diagnos[es] which is not found to be a medically unexplained chronic disability of unknown etiology." Appx190-196. He concluded that "morbid obesity not subject to compensation. Appx200. Mr. Larson timely appealed and at a May 2013 BVA hearing, showed the hearing officer his in-service weight gain, the history of exposures, and challenged the adverse VA opinion. Appx160-1666; Appx415-449. Later that year, the BVA obtained an addendum opinion from the February 2014 doctor. Appx156-159. The Veterans Court later found her opinion as to several of the claimed conditions to be inadequate. Appx7-8. The BVA remanded, and the Secretary issued a Supplemental Statement of Case a month later. Appx89-120; Appx128, Appx129-155. In September 2015, the doctor who authored the third medical opinion reasserted her opinion. Appx83-88. Mr. Larson renewed his challenges to her competency and qualifications. Appx56-73. The Secretary conceded, and the Veterans Court agreed, that the BVA failed to address whether these opinions lacked sufficient rationale. Appx7.

In December 2016, the BVA issued its decision and denied service connection for obesity and DMS. Appx23-25; Appx31. It found obesity could not be service connected because it "is not listed in the rating schedule as a specifically ratable condition." Appx5; Appx24; Appx48. As to DMS, the BVA decided it could not be service-connected because it "is not manifested by anything that would be ratable under the VA's rating schedule." Appx5-6; Appx24; Appx48.

The Veterans Court holds that reviewing a BVA decision that obesity and Dysmetabolic Syndrome cannot be service connected is outside of its jurisdiction.

In light of the Secretary's concession that the BVA failed to provide adequate reasons or bases for finding the medical expert opinion and addendum adequate, failed to address challenges to the expert's qualifications, and failed to explain why it disregarded a favorable opinion, the Veterans Court vacated and remanded the denial of service connection for hypothyroidism and hypogonadism. Appx7. Mr. Larson asks the Court not to disturb these favorable findings.

The Veterans Court affirmed the BVA's denial of service connection for DMS and obesity. Appx8-10. The Court did not reach the merits of Mr. Larson's argument, instead holding it lacked jurisdiction

to review a BVA determination of what constitutes a disability under §1110. *Id.* Such an inquiry, the lower court found, is "indistinguishable" from a review of which ratings the Secretary assigns to which conditions, which is prohibited by 38 U.S.C. §7252(b). *Id*. The Veterans Court did not explain how a BVA decision that obesity and DMS are not service-connectible disabilities under §1110 is part of the Secretary's adoption or revision of the VA Schedule of Rating Disabilities ("VASRD"). Instead, it relied on its own panel decision in *Marcelino v. Shulkin*, and *dicta* in a Federal Circuit panel opinion in *Wanner v. Principi* to find that it lacked jurisdiction under §7252(b). *Id*.

This appeal followed.

SUMMARY OF ARGUMENT

An obesity epidemic plagues the veterans' community – nearly 78% are overweight or obese. For many of these veterans, access to healthcare for the treatment of their obesity, and other types of benefits, require a VA rating decision stating that their obesity is a disability that results from an injury or disease in service.

With arguably no analysis, the BVA found that Mr. Larson's obesity and dysmetabolic syndrome (DMS) are not disabilities resulting

from his military service, not because he failed to make the proof, but because they are not specifically listed on the VA Schedule of Rating Disabilities (VASRD). The Veterans Court, with little analysis and relying on its decision in *Marcelino*, found the BVA's decision that Mr. Larson's obesity and DMS could not constitute a disability under 38 U.S.C. §1110 was a review of the VASRD prohibited by 38 U.S.C. §7252(b).

In neither *Marcelino* nor this case has the Veterans Court explained how a BVA decision refusing to make the up-stream determination of what constitutes a disability in accordance with §1110 is part of the Secretary's adoption or revision of the contents of the VASRD in 38 U.S.C. §1155. Neither the Court's decision in *Marcelino* nor its decision here interpret 38 U.S.C. §7252(b) to determine whether the review of what constitutes a disability is part of the VASRD, and Mr. Larson asks the Court to interpret that statute here.

The Court has been called upon to protect the jurisdictional prohibition in §7252(b) from shrinking; Mr. Larson asks the Court to again protect that jurisdiction firewall, by not allowing it to expand beyond Congressional intent.

The BVA's decision that obesity and DMS are not disabilities does not constitute the adoption or revision of the content of the VASRD. The canon "*expressio unius est exclusio alteris*," the pro-veteran canon, and other canons support this interpretation of §7252(b), as it imposes a strict limit on the prohibition of judicial review of the Secretary's adoption or revision of content in the VASRD. Congress could not have intended for the prohibition to sever any review of a BVA decision that finds a condition cannot constitute a disability resulting from injury or disease, as it would have not only prevented veterans from accessing other statutorily based health, housing, welfare, and employment benefits, but it would have changed the fundamental nature of those benefits by making them derivative of the rating of a disability, not the determination of a service-connected disability itself.

There is no precedent for the Veterans Court's sweeping expansion of the jurisdictional prohibition in §7252(b). In both cases, the Veterans Court relied on *dicta* in *Wanner v. Principi* to hold that review of what constitutes a disability is "indistinguishable" from the review of the VASRD prohibited in 38 U.S.C. §7252(b). The Veterans Court did not respond to Mr. Larson's argument that the phrase relied

upon was *dicta* in the *Wanner* decision. This case is not like *Wanner,* because that case involved a review of a regulation in the VASRD itself. This case is more like *Saunders,* in which this Court exercised its jurisdiction to define what constitutes a disability for §1110 purposes, and apply that definition to find that pain is such a disability.

Should the Secretary request the Court defer to his interpretation of §1110 in a 2017 OGC opinion, Mr. Larson argues that opinion is not persuasive. First, an opinion interpreting §1110 is not persuasive as to the interpretation of §7252(b). Second, an opinion that obesity is not a disease that can produce disability is immaterial to a case where the question is whether obesity is a disability resulting from multiple environmental exposures in service during Desert Storm. Third, the opinion undercuts the Secretary's own health care priority: treatment of overweight and obese veterans.

Mr. Larson argues that while the Court can conclude that obesity and DMS are capable of being service-connected disabilities, it cannot review whether the BVA decision denying service connection of them is proper, as Mr. Larson has never had the benefit of a BVA review

applying the correct framework of what constitutes a disability post-*Saunders*.

He asks the Court to reverse the decision of the Veterans Court, and remand his appeal to the BVA to develop and adjudicate Mr. Larson's obesity and DMS claims, as well as the secondary conditions inextricably intertwined with them, in light of the correct framework for what constitutes a disability. He asks the Court to over-rule *Marcelino*.

ARGUMENT

1. The CAVC interpretation of 38 U.S.C §7252(b) impermissibly expands Congress's bar against judicial review of the VA Schedule of Rating Disabilities ("VASRD").

1.1. Congress intended 38 U.S.C. §7252(b) only to insulate the Secretary's adoption or revision of the VASRD from "piecemeal review of individual rating classifications."

Congress gave the Veterans Court exclusive jurisdiction to review BVA decisions. 38 U.S.C. §7252(a). In doing so, the legislature expressly barred judicial review of the Secretary's adoption or revision of content in the VA Schedule of Ratings for Disabilities (VASRD) under 38 USC 1155. 38 U.S.C. §7252(b); *accord* 38 U.S.C. §7292(a). The VASRD is how the Secretary determines "what rating of reduction in earning capacity

a claimant should be assigned based upon the nature and extent of the claimant's injuries." *Fugere v. Derwinski*, 972 F.2d 331, 335 (Fed. Cir. 1992).

The Court has protected this jurisdictional bar, rendering the Secretary's adoption or revision of the contents of the VASRD nigh unreviewable. Section 7292(b) bars "judicial review of the content of the disability rating schedule *in toto*. *Wanner v. Principi*, 370 F.3d at 1130 (emphasis added). The review prohibited by §7252(b) includes "*all* review involving the content of the rating schedules and the Secretary's actions in adopting or revising them." *Id (emphasis in original).* The Veterans Court may not review whether or why the Secretary has chosen to eliminate periodontal disease from the VASRD. *Wingard v. McDonald,* 779 F.3d 1354, 1355 (Fed. Cir. 2015). The Veterans Court may not consider whether or not a particular diagnostic code in the VASRD is "contrary to law." *Wanner,* 370 F.3d at 1130*, quoting Villano v. Brown,* 10 Vet. App. 248, 250 (1997). The Veterans Court may not invalidate a specific element necessary to receive a compensable rating for tinnitus under DC 6260. *Wanner,* 370 F.3d at 1131.

Judicial review of the VASRD can occur in two scenarios. First, the VASRD must answer to a constitutional challenge. *Nyeholt v. Sec'y of Veterans Affairs,* 298 F.3d 1350 (Fed. Cir. 2002). Second, the Court can review the Secretary's actions adopting or revising the contents of the VASRD to ensure compliance with the Administrative Procedure Act. *See Fugere v. Derwinski,* 972 F.2d at 334 – 335.

The jurisdictional firewall in 7252(b) has a clear terminus: it "*only* prohibits review of the substance of the Secretary's action with respect to the schedule of ratings." *Id* (emphasis added). The legislature's "restriction on the scope of review of VA rules and regulations" only protects the VASRD from destruction "by piecemeal review of *individual rating classifications*." *Wanner,* 370 F.3d at 1130, *citing* S. Rep. 100-418 at 53 (emphasis added).

As shown above, the Court has been called upon to ensure the §7252(b) jurisdictional limit did not shrink. Today, Mr. Larson asks the Court to again protect the jurisdictional limit in §7252(b), this time, to keep it from encroaching beyond the legislature's intent.

Unlike *Wanner*, this case does not involve a challenge to the adoption or revision of content in the VASRD. Mr. Larson does not ask

the Court to determine whether or not the Secretary should "adopt and apply a schedule of ratings" for obesity and/or DMS in the VASRD. 38 U.S.C. §1155. Even if the Court could do that (it cannot), Mr. Larson's ratings for obesity and DMS are not yet ripe for review unless and until the Secretary grants service-connection. *Grantham v. Brown*, 114 F.3d 1156, 1158 – 1159 (Fed. Cir. 1997).

It is instead the denials of service connection for obesity and DMS that are the central dispute.

The pivotal question in this case concerns the BVA's decision that "obesity is not a condition for which service connection can be granted" and that DMS is not a current disability "because it is not manifested by anything that would be ratable under [VASRD]." Appx23.

If a BVA decision to deny service connection for obesity and DMS, based solely on the absence of rating criteria, is "a part of the 'schedule of ratings' " then §7252(b) bars judicial review. *See e.g., Fugere,* at 334 – 335.

If the BVA decision is instead a function of a separate and distinct adjudication as to whether obesity and DMS can be disabilities under

§1110, then the Veterans Court finding that §7252(b) precludes judicial review is in error.

Neither statute nor regulation extends the §7252(b) bar against judicial review of the VASRD to a BVA decision that a veteran does not have a "disability resulting from injury or disease in service."

1.2. The Veterans Court blended the determination of what constitutes a disability under §1110 into the adoption or revision of the contents of the VASRD under §1155.

Mr. Larson timely appealed the BVA decision and asked the Veterans Court to interpret 38 U.S.C. §1110 and find "the Court has jurisdiction to review the Board's findings that obesity and dysmetabolic syndrome are not disabilities" under §1110. *Larson v. Wilkie,* CAVC Cause # 17-0744, Appellant's Opening Brief (September 17, 2018) at page 18 – 26 (hereinafter, "Appellant's CAVC Opening Brief"); *accord* Appx9. In addition to his *Chevron* argument, Mr. Larson reasoned that when *Saunders v. Wilkie* defined the term disability for §1110 purposes it effectively over-ruled the Veterans Court's holding in *Marcelino*. *Appellant's CAVC Opening Brief*, at page 8, 21 – 22. In *Marcelino,* the Veterans Court held it lacked jurisdiction to review

whether or not a condition was a disability within the meaning of §1110. *Marcelino v. Shulkin,* 29 Vet. App. 155 (2018).

The Secretary challenged the Veterans Court's jurisdiction. The major premise of his argument was that obesity and DMS are not specifically listed on the VASRD. *Larson v. Wilkie,* CAVC Cause # 17-0744, Appellee's Response Brief (January 2, 2019) at page 22 (hereinafter, "Appellee's CAVC Response Brief"). His minor premise was that a "review of what is excluded from the rating schedule is a review of the 'content selected' for the rating schedule." *Appellee's CAVC Response Brief,* at page 22 – 23. Relying on *Wanner*, *Byrd* and *Marcelino*, the thrust of his argument was that because obesity and DMS are not specifically listed on the VASRD "review of what is excluded from the rating schedule is a review of the 'content selected' for the rating schedule." *See Appellee's CAVC Response Brief,* at page 19 – 23.

The Veterans Court recognized the three elements needed to establish the threshold inquiry in a service connection claim, i.e., does a veteran have a "disability resulting from personal injury suffered or disease contracted in line of duty." Appx9, *citing Shedden v. Principi,*

381 F.3d 1313, 1316 (Fed. Cir. 2009). As to the "current disability" element that the BVA found lacking, the Veterans Court acknowledged that the term "disability" meant a "functional impairment of earning capacity, not the underlying cause of said disability." Appx9, citing *Saunders v. Wilkie,* 886 F.3d 1356 (Fed. Cir. 2018).

The Veterans Court noted that, in *Marcelino,* it found the question of whether obesity was a disease for §1110 purposes is "nothing more than a backdoor substantive challenge to the content of the rating schedule that this Court may not and will not entertain." Appx9. It looked to this Court's decision in *Wanner,* characterizing it as a holding "that 'direct review of the content of the rating schedule is 'indistinguishable' from review of what should be considered a 'disability.' " Appx9, *citing Wanner,* 370 F.3d at 1131. The Veterans Court did not address Mr. Larson's concern, asserted in his opening brief, that the statement in *Wanner* was *dicta* and not the holding of that case. *Appellant's CAVC Opening Brief,* at page 21. The Veterans Court concluded it "lacks jurisdiction to determine what conditions are or should be disabilities for VA compensation purposes." Appx 10.

Implicit, but unexplained, in the lower court's decision is the idea that a BVA decision that obesity and DMS are "disabilit[ies] resulting from personal injury suffered or disease contracted in line of duty" is somehow part of the VASRD.

1.3. The Veterans Court erred because a BVA decision that obesity and DMS are not disabilities for §1110 purposes is not Secretarial action "adopting or revising" the VASRD.

The Veterans Court did not explain how a BVA finding of fact on the threshold element of "current disability" in a service connection claim is part of the "schedule of ratings". Congress did not intend the Secretary's adoption or revision of the VASRD to include an up-stream consideration as to whether a disability results from injury or disease in service. Judicial decisions and reasoning, from this and the Veterans Court, yield an outcome different from the one reached in this appeal and in *Marcelino*. And a precedential opinion of the OGC, issued after the BVA decision in this case, that obesity is not a disease capable of producing disability is not persuasive of whether the in-service environmental, chemical and vaccine exposures in this case are capable of producing a disability, namely obesity and DMS.

Resolution of this requires an interpretation of the Veterans Court's jurisdictional statute to determine if the bar on judicial review of the contents of the VASRD extends to a BVA decision that obesity and DMS are not disabilities for the purposes of §1110.

1.3.1. The Veterans Court's expansion of the limit on judicial review of the contents of the VASRD harms veterans entitled to recover many benefits derivative of a service-connected disability.

The Court interprets statutes using the *Chevron* two-step approach. *Chevron U.S.A., Inc., v. NRDC*, 467 U.S. 837 (1984). Under that approach, the Court affords "an agency's interpretation of the law no deference unless, after '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. The Court affords no deference to an agency's interpretation of a statute "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).

At least three canons apply to this appeal. First, the canon *expressio unius est exclusio alteris* applies where a "term left out must have been meant to be excluded." *Figueroa v. Sec'y of HHS*, 715 F.3d

1314, 1322 (Fed. Cir. 2013), *quoting Chevron U.S.A. Inc v. Echazabal*, 536 U.S. 73, 81 82 (2002). Second, the presumption that "Congress 'legislate[s] against the backdrop of existing law' " can reinforce a statute's unambiguous language. *See Gazelle v. Shulkin*, 868 F.3d 1006, 1011-12 (Fed. Cir. 2017). Third, courts have "long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011), *citing King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21, n.9 (1991)(internal quotations omitted). Interpretive doubt should be resolved to the benefit of veterans. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). This canon is related to the canon that construes remedial statutes liberally to effectuate, not frustrate, their purpose. *See Boone v. Lightner*, 319 U.S. 561, 575 (1943); *Beley v. Naphtaly*, 169 U.S. 353, 361 (1898).

Assuming the claimant is an eligible veteran, the threshold inquiry in a service-connection claim considers whether he has a "disability resulting from personal injury or disease suffered in line of duty." 38 U.S.C. §1110; *accord generally* 38 U.S.C. §§101(1), 105.

A favorable finding that a veteran's disability is service-connected is the "jumping-off" point from which a veteran may gain access to an array of benefits, pecuniary and non-pecuniary. In the VA's parlance, using terms from its public website, entitlement to some benefits are "derivative" of the favorable §1110 finding.[1] In the Court's parlance, the "up-stream element of service-connectedness" is a necessary predicate to the consideration of entitlements to down-stream benefits. *See Grantham,* 114 F.3d at 1158.

One of those down-stream, or derivative, benefits is VA disability compensation. The Veterans Court's jurisprudence is clear that the "issue of whether a disability is service-connected" is "separate and distinct" from the "issue of whether a disability should be awarded a compensable rating." *West v. Brown,* 7 Vet. App. 329, 335 – 336 (1995). Once service connection is established in accordance with §1110, a disability is rated using the VASRD, a schedule of ratings based on the "average impairments in earning capacity" that result from "specific

[1] https://benefits.va.gov/BENEFITS/derivative_sc.asp (last visited August 17, 2020); *accord,*
"Are you eligible for more VA benefits? New web matrix explains primary, derivative benefits.", va.gov, found at https://tinyurl.com/yyldo9by (last visited August 17, 2020).

injuries or combinations of injuries." 38 U.S.C. §1155. The VASRD, found at 38 C.F.R. Pt. 4, is a list of conditions grouped by anatomical system, the corresponding "diagnostic codes," and the elements needed to convert "the veteran's *degree of disability* and the effect of that disability on the veteran's earning capacity" into a compensable rating percentage of 10 to 100-percent. 38 C.F.R. Pt. 4; *see Nat'l Organization of Veterans' Advocates v. Sec'y of Veterans Affairs,* 927 F.3d 1263, 1264 (Fed. Cir. 2019) (emphasis added); *accord,* 38 U.S.C. §1155. The finding that a veteran's disability is service connected is "a status which carries with it a rating of at least 0% -- a so-called noncompensable rating." *West,* 7 Vet. App. at 335 – 336. For some disabilities, the degree of disability defined in the VASRD might merit assignment of a 0-percent "compensable rating." *See e.g.,* 38 C.F.R.§ 4.310 "General Rating Formula for Mental Disorders."

VA disability compensation is just one down-stream benefit that derives from a favorable determination that a veteran has a §1110 disability. For example, a noncompensable rating can open access to VA health care for the veteran's service-connected condition, possibly entitling him to a higher "priority group" within the VA healthcare

system. 38 C.F.R. §17.36(b)(3),(7),(8). In certain circumstances, a veteran with a non-compensable rating could be eligible for VA outpatient dental care. 38 U.S.C. §1712(a)(1)(B). Veterans with a noncompensable rating get a 10-point preference in federal hiring. 5 U.S.C. §2108(2). Noncompensable ratings open the door to a veteran's ability to access military commissaries, exchanges and morale, welfare and recreation (MWR) retail facilities, in-person and online. 5 U.S.C. §1065(d). Within the VA disability compensation system, the existence of two or more non-compensable ratings which "clearly interfere with normal employability" triggers entitlement to a 10-percent compensable rating. 38 C.F.R. §3.324. Veterans receiving that benefit are entitled to a waiver of the funding fee for a VA home loan, and burial and plot allowance. 38 U.S.C. §3729(c)(1).

In addition to benefits derived from the existence of a §1110 disability, veterans are also entitled to benefits down-stream, or derivative, of the separate determination of the degree of disability as provided in §1155 and the VASRD. For example, a veteran is eligible for the VA's Vocational Rehabilitation and Employment (VR&E) benefit when his disability is rated at 20-percent. 38 U.S.C. §3102(a). A 50-

percent rating entitles a veteran to concurrent receipt of military retired pay and disability compensation. 38 C.F.R. §3.750(b)(1).

Congress was aware of the range of benefits derivative of an §1110 finding that a veteran's disability resulted from a disease or injury in service when it passed §7252(b). With that awareness, it explicitly barred judicial review of only *one* aspect of *one* down-stream benefit: the Veterans Court may not review the Secretary's determinations of what disabilities are compensable, or the calculus for determining the compensation rating under the VASRD. 38 U.S.C. §7252(b). Congress did not extend that bar on judicial review to the determination of what constitutes a disability under §1110, no less to any other benefits derivative of that §1110 determination.

The Veterans Court's decisions in *Marcelino* and *Larson* supplant Congress's clear expression of its intent and represent a significant judicial expansion of the Congressional bar against judicial review. In VA parlance, after the Veterans Court's decisions in *Larson* and *Marcelino*, benefits derivative of the §1110 determination are now derivative of the §1155 determination. In Court parlance, the Veterans Court converted the down-stream disability compensation benefit into

the up-stream predicate for the benefits identified above, and others like them.

Congress could not have intended that result, or that degree of harm to veterans. Veterans previously eligible for (sometimes desperately needed) housing, employment, insurance, and health care benefits have lost access to those benefits because they can no longer service-connect certain disabilities, even with a non-compensable rating. This inhibits veterans' ability to rejoin, and reintegrate into, civilian life. As a result of the Veterans Court's decision in *Marcelino* and *Larson*, a veteran with a noncompensable §1110 disability can no longer take advantage of the VA home loan funding fee waiver because the BVA believes the absence of his disability on the VASRD means that a disability under §1110 cannot exist. The same happens to the veteran who, before *Marcelino* and *Larson,* was eligible for VA health care if he had service-connected obesity, or whose 10-point hiring preference might have been her key to attaining a living wage in a federal government position.

The illustration in Figure 2 makes the point where words fall short:

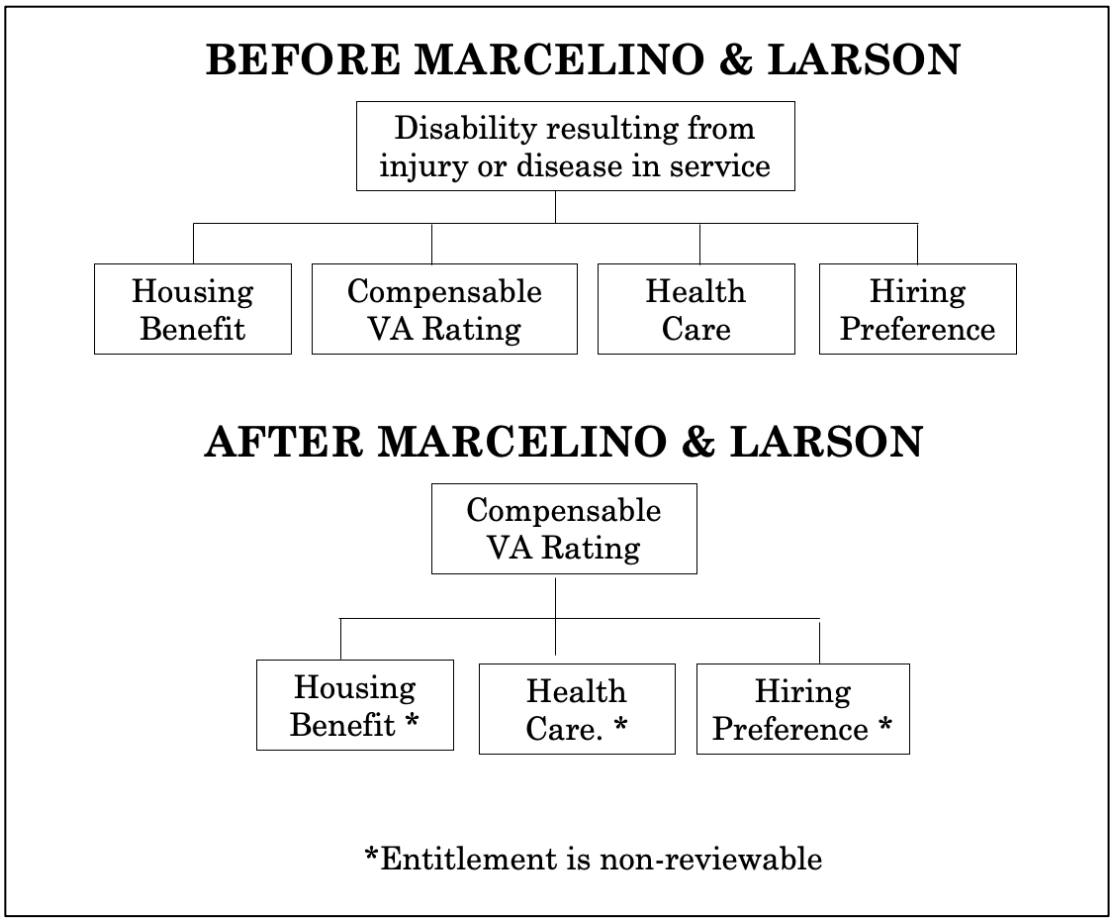

Figure 2

When the Secretary wanted to bar a condition from being considered an §1110 disability, it did so in regulations outside the VASRD. *See e.g.*, 38 C.F.R. §3.303(c). When the Secretary wanted to define the elements needed to establish hearing loss as an §1110 disability, it did so in a regulation outside of the VASRD. *See* 38 C.F.R. §3.385. And in both of those cases, the Secretary's regulations as to what constitutes an §1110 disability had to withstand judicial review.

Terry v. Principi, 340 F.3d 1378 (Fed. Cir. 2003); *Palczewski v. Nicholson,* 21 Vet. App. 174, 178 (2007). There is no evidence any Court ever considered the Secretary's adoption or revision of those regulations to be part of the VASRD.

The Veterans Court's decision to expand the bar on judicial review in §7252(b) in *Marcelino,* and which it applied here, is unprecedented.

1.3.2. No legal authority permits the Veterans Court to blend the definition of disability under §1110 into the Secretary's adoption or revision of content of the VASRD.

The Veterans Court did not interpret §1110 to determine whether obesity or DMS could be a functional impairment of earning capacity in either *Marcelino* or *Larson*. *Marcelino,* 29 Vet. App. 155; Appx8-10. Instead, it relied on a passing statement in *Wanner* that "direct review of the content of the rating schedule is 'indistinguishable' from review of what should be considered a 'disability.'" Appx9.

The Veterans Court's reliance on this statement is inconsistent with its jurisprudence. "[W]hen a veteran's condition is not listed in the rating schedule, the Board may assign a rating by analogy under 38 C.F.R. §4.20." *Kuppamala v. McDonald*, 27 Vet. App. 447, 449 (2015). "When an unlisted condition is encountered it will be permissible to rate

under a closely related disease or injury." 38 C.F.R. §4.20. Although "ischemic injury to the cerebellum manifested by balance problems" appears nowhere in the VASRD, the Veterans Court exercised jurisdiction to review a BVA decision rating the condition. *See, Lendenmann v. Principi*, 3 Vet. App. 345, 350 (1992). And, in a 2018 memorandum decision, the Veterans Court found that "[i]n considering whether [a veteran] has a current disability, the Board must apply *Saunders v. Wilkie." Axley v. O'Rourke*, No. 17-0041, 2018 U.S. App. Vet. Claims LEXIS 778, at *10 (June 11, 2018). Though a non-precedential memorandum decision, offered here only to show the inconsistency in the Veterans Court's jurisprudence post-*Saunders*, the lower court observed in *Axley* without mentioning *Wanner* "that the legal underpinnings of the Board's current-disability analysis are now faulty in light of *Saunders,"* and exercised its §7252(a) jurisdiction to vacate and remand a BVA decision that found a veteran did not establish an "earache disability." *Id*. Consistent with that approach, when the Veterans Court exercised its jurisdiction under §7252(a) to review – on the merits – BVA denials of service connection for conditions that also do not appear on the VASRD, e.g., Gilbert

syndrome, neurodermatitis, and stronglyoides infection, it has not mentioned the *Wanner dicta*.[2] However, in a panel decision issued days before this brief, the Veterans Court relied again on the *Wanner dicta* to refuse jurisdiction over a BVA decision finding that psychiatric impairments without a DSM-V diagnosis could not be service-connected. *Martinez-Bodon v. Wilkie,* ____ Vet. App. ____, 2020 U.S. App. Vet. Claims LEXIS 1523 (August 11, 2020). *Martinez-Bodon* is not binding on this Court, although it is distinguishable because it involves two regulations in the VASRD which appear to limit schedular disability compensation to those psychological impairments with a DSM-V diagnosis. *See id*; 38 C.F.R. 4.125 and 4.130.

The *dicta* in *Wanner* is the fulcrum on which the Veterans Court's decisions in *Marcelino* and *Larson* rest. Mr. Larson reads it as *dicta* because "it was unnecessary to decide the case, and hence is not *controlling*." *Orenshetyn v. Citrix Sys.,* 691 F.3d 1356, 1361 – 1362 (Fed. Cir. 2012) (emphasis added). In *Wanner,* the Veterans Court considered

[2] *See e.g., Aronson v. Wilkie*, No. 17-1974, 2018 U.S. App. Vet. Claims LEXIS 1704, at *10-15 (Dec. 28, 2018); *Romine v. Shinseki*, No. 09-0646, 2011 U.S. App. Vet. Claims LEXIS 303, at *13 – 20 (Feb. 16, 2011); *Dossey v. McDonald*, No. 14-4072, 2016 U.S. App. Vet. Claims LEXIS 1306, at *15 – 16 (Aug. 26, 2016).

a claimant's entitlement to a rating for previously service-connected tinnitus, stating "the issue is whether the Court's examination of DC 6260 (1998) for consistency with section 1110 constitutes the 'review [of] the [rating] schedule' that section 7252(b) prohibits." *Wanner v. Principi,* 17 Vet. App. 4, 14 – 15 (2003), *overruled by Wanner,* 370 F.3d 1124 (brackets in original). The Veterans Court held that a predicate required for a compensable tinnitus rating in DC 6260 (undisputably part of the VASRD) was invalid because it conflicted with 38 U.S.C. §1110. *Wanner,* 370 F.3d at 1128 – 1129. The lower court's decision contains a passing statement that under §7252(b) "[c]ourt review is precluded as to…what should be considered a disability." *Wanner*, 17 Vet. App. at 14 – 15. No citation or authority follows that statement. On review, this Court reversed the lower court's decision. Towards the end of the decision, this statement appears: "[t]he review undertaken by the Veterans Court here amounts to a direct review of the content of the rating schedule and is indistinguishable from the review of 'what should be considered a disability' that the Veterans Court itself recognized as impermissible. *Wanner*, 370 F.3d at 1131.

Mr. Larson notes at least two ways to understand that statement. On one hand, the Court may have been illuminating the internal inconsistency of the lower court's reasoning by pointing out it had done the very thing it believed it could not do. On the other hand, because the issue in the case was entitlement to a rating (as opposed to entitlement to service-connection) both courts might have been referring not to the definition of "disability" in §1110 for service connection purposes, but what symptomatology constitutes a disability for the purposes of assigning rating.

Even if both courts were blending review of rating criteria under §1155 with review of what constitutes a disability under §1110, the issue in the case was entitlement to a rating for tinnitus under §1115, not entitlement to service-connection for tinnitus under §1110. Because the outcome of *Wanner* would have been the same with, or without, the statement that "review of the content of the rating schedule [ ] is indistinguishable from the review of what should be considered a disability," that statement is *dicta*. *Wanner* 370 F.3d at 1131 (internal quotations omitted).

While *dicta* can be persuasive, that statement is not persuasive for at least three reasons.

First, in light of the clear demarcation between up-stream and down-stream elements in service connection claim, it is not readily apparent from the decision in *Wanner* how the adjudication of a separate and distinct up-stream inquiry as to what constitutes a disability under §1110 is "indistinguishable from" the Secretary's adoption or revision of the content of the VASRD.

Second, neither the BVA nor the Veterans Court explain in *Larson* or *Marcelino* how one of roughly 80,000 annual non-precedential BVA decisions could reflect "the considered judgment of the agency as a whole" such that it could constitute a regulation adopting or revising the content of the VASRD in the first place. *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2424 (2019). This is particularly pertinent in Mr. Larson's appeal, as the BVA could not have been bound by the OGC opinion on obesity, as it was published after the decision in this case.

Third, the *dicta* in *Wanner* is not persuasive because it is inconsistent with a binding panel decision in this Court. In *Saunders v. Wilkie,* the Court considered what constitutes a disability under §1110.

Saunders v. Wilkie, 886 F.3d 1356 (Fed. Cir. 2018). If the *Wanner dicta* and §7252(b) precluded the Veterans Court from conducting this inquiry, then this Court would have similarly been precluded from conducting the *Saunders* inquiry. 38 U.S.C. §7292(a). In *Saunders,* the Secretary did not argue the Court lacked jurisdiction to review the VASRD under §7292(a). *Saunders v. Wilkie,* 886 F.3d at 1361. Nevertheless, the Court considered whether it had jurisdiction, found that it did, and resolved the issue of what constitutes a disability for service connection purposes. *Id*.

This case is controlled not by *dicta* in *Wanner,* but instead by the holding in *Saunders*.

In *Saunders,* when a veteran sought to service-connect her pain, the BVA found she had "failed to show the existence of a present disability." *Saunders,* 886 F.3d at 1359. Here, the BVA found that Mr. Larson had failed to meet the current disability element of the service connection test. Appx23.

In *Saunders,* the Veterans Court affirmed the BVA stating that *Sanchez-Benitez,* "holds that pain alone, without a diagnosed or identifiable underlying malady or condition, does not in and of itself

constitute a disability for which service connection may be granted." *Saunders*, 886 F.3d at 1359. Here, the Veterans Court affirmed the BVA by relying on *Wanner* for the "holding" that "direct review of the content of the rating schedule is 'indistinguishable' from review of what should be considered a 'disability.' " Appx9-10.

The appellant in *Saunders* argued that a statement in *Sanchez-Benitez* upon which the lower court's decision rested was *dicta* and not controlling. *Saunders*, 886 F.3d at 1360. Mr. Larson argued to the Veterans Court, and to this Court, that the statement relied upon from *Wanner* was *dicta* and not a holding. *See Appellant's CAVC Opening Brief,* at page 21.

In *Saunders,* the Court reversed the Veterans Court. *Saunders*, 886 F.3d at 1358. It acknowledged that the language relied on below was *dicta,* and interpreted §1110 to define a disability as "the functional impairment of earning capacity, not the underlying cause of said disability." *Id,* at 1363. The Court remanded the matter to the BVA to determine whether the appellant's pain was a disability by applying the correct §1110 framework. *Id,* at 1361. Necessarily implicit in the Court's order reversing the lower court and remanding the matter to the BVA

for further factual development in *Saunders*, is the premise that the Veterans Court had jurisdiction under §7252(a) to review the BVA's finding of fact as to what constitutes a disability.

Similar cases call for similar relief. In *Larson,* the legal issue is whether obesity or DMS can constitute a disability for purposes of service connection under §1110. Following *Saunders,* Mr. Larson seeks reversal of the Veterans Court refusal of jurisdiction, and remand to the BVA to develop the factual record and apply the correct test to determine if Mr. Larson's obesity and DMS are disabilities under §1110.

1.3.3.The OGC opinion that obesity is not a disease lacks the power to persuade that obesity is not a disability.

A month after Mr. Larson's BVA decision, the Secretary's Office of General Counsel ("OGC") issued a precedential opinion that obesity could not be service connected. Appx450-459. Even if the BVA had relied on that opinion it is not binding on either this Court or the Veterans Court. *See Wanless v. Shinseki,* 618 F.3d 1333, 1338 (Fed. Cir. 2010).

Before the Veterans Court, the Secretary sought *Skidmore* deference for the OGC opinion interpreting §1110. *Appellee's CAVC Response Brief,* at page 23 – 25. "Because it lacks the formalities of

notice-and-comment rule-making," however, an OGC opinion "is entitled to deference only in so far as it has the 'power to persuade.' " *Wanless,* 618 F.3d at 1338; *Skidmore v. Swift & Co.,* 323 U.S.134, 140 (1944). There are at least three reasons that the OGC opinion is not persuasive.

First, the opinion relies on a juxtaposition of the words disability and disease as used in §1110, exploring why obesity cannot be a disease or injury that produces disability. *See e.g.,* Appx450. In this case, however, that question is immaterial, because the question is whether obesity is a *disability* resulting from injury, not an *injury* productive of disability. "Disability" as used in §1110 refers to "impairment of earning capacity due to disease, injury, or defect, *rather than to the disease, injury, or defect itself*." *Allen v. Brown*, 7 Vet. App. 439, 448 (1995) (en banc) (emphasis added); *Hunt v. Derwinski*, 1 Vet. App. 292, 296-97 (1991). Mr. Larson is not arguing that his obesity post-service results from the disease of obesity in service. He is arguing that a rapid and sustained weight gain in-service can be a functional impairment resulting from a host of environmental and chemical exposures during Desert Storm. When the material issue in this appeal is whether obesity

is a *disability* resulting from in-service injuries, an opinion that disability cannot result from obesity lacks the power to persuade.

Second, the OGC opinion lacks persuasive power because it rests on unsound reasoning. The opinion states that obesity cannot be an in-service event (i.e., a "disease contracted or personal injury suffered") because it occurs over time as opposed to a discrete event. Appx451. The facts of this case undercut that foundational premise. Mr. Larson's obesity did not occur over a long time, instead occurring in a short and discrete window of time during and after Desert Storm. Further, the passage of time is irrelevant to the existence of many in-service injuries: radiation exposure, for example, also occurs over time, but remains a long-acknolwedged in-service event.

Third, the opinion is not persuasive because it undercuts the Secretary's established priorities: because "78% of Veterans are overweight or obese," the "treatment of both overweight and obesity is consistent with the priorities outlined by the leadership of the Department of Veterans Affairs as part of a personalized proactive Veteran-driven care". Appx465. Yet, as a result of the decisions in *Larson* and *Marcelino*, many veterans will not qualify for health care

treatment through the VA because the agency will not service connect obesity, even as a non-compensable disability. Because the OGC opinion that obesity cannot be a disease creates a substantial impediment to the achievement of a top health priority of the Secretary (the treatment of the obesity epidemic in the veterans community) it lacks the power to persuade.

2. Because they can cause functional impairment, obesity and DMS can be service-connected disabilities.

The Court confronted this exact issue when it evaluated whether "pain alone can serve as a functional impairment and therefore qualify as a disability, no matter the underlying cause." *Saunders,* 886 F.3d at 1363 – 1364. Pain is such an impairment, the Court reasoned using dictionary definitions of impairment, "because it diminishes the body's ability to function" *Id.* The Court confirmed that because VA disability rating regulations treated "pain as a form of functional impairment" they were "relevant to the question of whether pain can be a disability. *Id.* The Court concluded that "[g]iven this broad recognition that pain is a form of functional impairment, if Congress intend to exclude pain from the definition of disability under §1110, it would have done so expressly. *Id,* at 1365.

The same analysis applies to determining whether obesity and DMS can be disabilities under §1110. As with pain in *Saunders,* so too can obesity cause a functional impairment by diminishing the body's ability to function. The Secretary acknowledges, in at least one diagnostic code in the VASRD, that obesity is a functional impairment that affects earning capacity. 38 C.F.R. §4.119 (DC 7907 – Cushing's Syndrome, 30-percent rating).

Obesity is different from pain, however, in that it produces secondary functional impairments by causing or worsening associated conditions such as "type 2 diabetes, hypertension, dyslipidemia, metabolic syndrome, osteoarthritis and obstructive sleep apnea." Appx467. Many of those associated conditions are themselves rated as functional impairments. *See e.g.,* 38 C.F.R. 4.71a (DC 5003 – Osteoarthritis); 38 C.F.R. §4.97 (DC 6847 – sleep apnea); 38 C.F.R. §4.104 (DC 7007 – hypertension); 38 C.F.R. §4.119 (DC 7913 – diabetes). This is relevant because, when confronted with the issue of whether a veteran's obesity "produces impairment beyond that contemplated by the rating schedule for the [condition that resulted in obesity]" the Veterans Court remanded for the BVA to undertake that

inquiry. *See e.g., Harbison v. Shulkin*, No. 16-0811, 2017 U.S. App. Vet. Claims LEXIS 549, at *10 (Apr. 21, 2017). And, the Veterans Court affirmatively held that obesity can be service-connected when it is aggravated by a service-connected condition. *Walsh v. Wilkie,* 32 Vet. App. 300 (2020). The Veterans Court has never explained how it has jurisdiction to consider whether obesity can be service-connected on an aggravation or secondary basis, but not on a direct service-connection basis.

Nevertheless, while this Court can generally conclude that obesity and DMS can be service-connected because they produce functional impairment, it cannot reach the question of whether Mr. Larson's obesity and DMS are related to his service.

Because the BVA found that obesity and DMS were not disabilities that could be service-connected, it has not developed the record or adjudicated whether either Mr. Larson's obesity or his DMS qualify as a disability under the *Saunders* framework. The BVA has made no findings of fact on the question of whether Mr. Larson's obesity and DMS impaired his function, or the scope of the impairment. Nor has it determined whether Mr. Larson satisfies the remaining two

prongs of his service connection claim, specifically, whether his obesity and/or DMS resulted from an in-service injury or disease including but not limited to his exposures to malaria and other vaccines, environmental toxins, or other known or unknown events and exposures during his time in service. Because the Court may not make those findings of fact in the first instance, Mr. Larson urges the Court to reverse the Veteran's Court's finding that it lacked jurisdiction over this appeal, so that the lower court may remand the matter to the BVA to make those findings of fact. *See Byron v. Shinseki,* 670 F.3d. 1202, 1205 (Fed. Cir. 2012).

3. Secondary conditions are inextricably intertwined.

Mr. Larson sought service-connection, on a secondary basis, of multiple other conditions related to either or both his obesity or DMS. Appx17-18 (edema, skin tags, acanthosis nigricans, and striae). The BVA found that "[t]o the extent that the Veteran has asserted that some conditions are caused or aggravated by others, service connection on a secondary basis is not warranted for any of these conditions." Appx20-21; Appx 29.

Where a decision on one issue would have significant impact upon another, the claims are "inextricably intertwined." *Clay v. Nicholson*, 21 Vet. App. 413 (2006); *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991). "Inextricably intertwined" claims may be remanded for adjudication with other related claims as a matter of judicial economy. *Tyrues v. Shinseki*, 23 Vet. App. 166, 178 – 179 (2009), *affirmed*, 631 F.3d 1380 (Fed. Cir. 2011), *vacated on other ground*s, 132 S. Ct. 75 (2011); *see Gurley v. Nicholson*, 20 Vet. App. 573 (2007), *aff'd sub nom. Gurley v. Peake*, 528 F.3d 1322. Because Mr. Larson's claims to service connect his edema, skin tags, acanthosis nigricans, and striae are "inextricably intertwined" with his claims to service connect his obesity and dysmetabolic syndrome, he requests that if the Court vacates and remands the denial of the latter, the Court also vacate and remand the denial of the former.

CONCLUSION & REMEDY

The Court should hold that a BVA determination of what constitutes a disability for purposes of §1110 is not the same as Secretarial action adopting or revising the content of the VASRD. The Court should reverse the Veterans Court's finding that §7252(b) barred

the lower court from reviewing the BVA's finding that obesity and DMS are disabilities that cannot be service-connected. The Court should remand the matter to the BVA to fulfill the duty to assist Mr. Larson in developing the factual record, and re-adjudicate the appeal by applying the correct legal definition of disability as per *Saunders*. The Court should include, in that remand order, a requirement that the BVA adjudicate Mr. Larson's "inextricably intertwined" claims to service connect multiple conditions secondary to obesity and/or DMS.

In addition to this relief, Mr. Larson respectfully requests the Court hold that its decision in *Saunders,* or in this case, specifically over-rule the Veterans Court's decision in *Marcelino v. Shulkin.*

Respectfully Submitted,
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Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0744

GARY R. LARSON, JR., APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

MEREDITH, *Judge*: The appellant, Gary R. Larson, Jr., through counsel appeals a December 8, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to benefits for hypertension, morbid obesity, dysmetabolic syndrome, hypothyroidism/chronic lymphocytic thyroiditis (CLT), hypogonadism, fatigue, edema, skin tags, acanthosis nigricans, and striae.[1] Record (R.) at 1-18. In his briefs, the appellant raises no arguments with the Board's denial of benefits for hypertension, and the Court therefore considers that matter abandoned and will dismiss the appeal as to that matter.[2] *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to

[1] Dysmetabolic syndrome, also called metabolic syndrome, is "a combination including at least three of the following: abdominal obesity, hypertriglyceridemia, low level of high-density lipoproteins [(HDL)], hypertension, and high fasting plasma glucose level, associated with an increased risk for diabetes." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1839 (32d ed. 2012). Edema is "the presence of abnormally large amounts of fluid in the intercellular tissue spaces of the body, usually referring to subcutaneous tissues." *Id.* at 593. Acanthosis is "diffuse hyperplasia of the spinous layer of the skin," *id.* at 9; acanthosis nigricans is "diffuse velvety acanthosis with dark pigmentation, found in areas of body folds such as the axillae or groin," *id.* A stria is "a band, line, streak, or stripe." *Id.* at 1784.

[2] The Secretary contends that the appellant also abandoned any appeal of the Board's decision denying benefits for fatigue, Secretary's Brief (Br.) at 1, but the appellant includes fatigue among the "secondary conditions" he is appealing, *see* Appellant's Br. at 3 n.2. For the sake of concision, the Court will refer to fatigue, edema, skin tags, acanthosis nigricans, and striae as the appellant does in his briefs, as "secondary conditions." The appellant contends that these conditions are secondary to his obesity and dysmetabolic syndrome. *Id.* at 29-30.

38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate those portions of the Board decision that denied entitlement to benefits for hypothyroidism/CLT and hypogonadism and remand those matters for further proceedings consistent with this decision. The Court will affirm those portions of the Board decision that denied benefits for morbid obesity and dysmetabolic syndrome, as well as for the secondary conditions.

I. BACKGROUND

The appellant served a period of active duty for training (ACDUTRA) in the U.S. Navy Reserves from June to November 1988 and served on active duty in the U.S. Navy from February 1989 to February 1993, including service in the Persian Gulf. R. at 1676, 1680. In August 2009, he filed a claim for benefits for numerous conditions, including acanthosis nigricans, edema, hypothyroidism/CLT, skin tags, dysmetabolic syndrome, morbid obesity, striae, hypogonadism, and fatigue. R. at 1191-95. He contended that "exposure to chemicals and vaccines" during service caused his claimed disabilities. R. at 1200.

The appellant underwent a VA medical examination in March 2010. R. at 1041-45. The examiner offered the following relevant opinions:

> 1. 40-year-old Navy veteran with history of chronic lymphocytic thyroiditis well documented. There is no family history of thyroid disease. Although it is impossible to state with certainty that [the appellant's] thyroid condition is related to environmental hazards that he encountered in the Gulf, giving [him] the benefit of the doubt, it is at least as likely as not that this condition is related to his military service.
>
> 2. Hypogonadism: Again this condition is of unknown etiology, but giving the [appellant] the benefit of the doubt, again in my opinion[,] it is at least as likely as not that this condition is related to his Gulf War Service and the environmental hazards to which he was exposed there.
>
> 3. There is no sufficient evidence to make a diagnosis of chronic fatigue syndrome other than mild post-prandial drowsiness[;] the [appellant] does not give a convincing history of chronic fatigue syndrome.

> 4. The [appellant] has been diagnosed with dysmetabolic syndrome, but not with diabetes mellitus.

R. at 1044-45. A VA regional office (RO) determined that the March 2010 examination report was insufficient in several respects and therefore sought clarification from the examiner. R. at 1032-35. In April 2010, a different VA examiner provided a clarifying opinion. Of note, the examiner stated: "Dysmetabolic syndrome is not a specific const[ell]ation of symptoms. It is associated with life[]style, obesity[,] and genetic[s]. [T]here is no known asso[ci]ation between service during the first [G]ulf [W]ar with its various exposures to the development of dysmetabolic syndrome." R. at 1023-24. The examiner reiterated that the appellant did not meet the diagnostic criteria for chronic fatigue syndrome and stated that there is "no known association" between service in the Persian Gulf "with its various exposures" and the development of hypothyroidism or hypogonadism. R. at 1024.

The April 2010 VA examiner provided an addendum opinion in July 2010. R. at 1001-06. The examiner noted that there were no "clinical, objective indicators" for acanthosis nigricans, edema, fatigue, skin tags, or striae; there were "clinical, objective indicators" for dysmetabolic syndrome, hypogonadism, hypothyroidism, and morbid obesity. R. at 1005. The examiner stated that he was unable to determine whether the appellant's "disability pattern" was "(1) an undiagnosed illness, (2) a diagnosable but medically unexplained chronic multisymptom illness of unknown etiology, (3) a diagnosable chronic multisymptom illness with a partially explained etiology, or (4) a disease with a clear and specific etiology and diagnosis" without resorting to speculation. R. at 1005, 1006. He further stated that "None of the above conditions are due to or aggrav[a]ted by any envi[ron]mental hazards exposure during the GULF war (presum[]ed to be the first Gulf Conflict) to include pyridostigmine bromide and ant[h]rax vaccination[,] since no association has been found based on review of the VA/[Department of Defense] envi[ron]mental health provider resource web site." R. at 1002.

In October 2010, the RO denied the appellant's claims for benefits. R. at 940-65. The appellant filed a Notice of Disagreement (NOD) with that decision, R. at 859-65, *see* R. at 751-55, and ultimately appealed to the Board, R. at 693-98.

The Board requested a medical expert opinion from a VA specialist in December 2013. R. at 578-81. A VA endocrinologist provided an opinion in February 2014. R. at 568-70. The expert stated:

> 1. It is not at least as likely as not that the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , [or] hypogonadotrophic hypogonadism . . . first manifested during active service or are medically related to injury or disease in active service.
>
> 2. It is not at least as likely as not that [the appellant's] extreme weight gain during active service caused or was an early manifestation of the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , or hypogonadotrophic hypogonadism . . . . In general[,] the above association is possible[;] however[,] it is not relevant to the case in review.
>
> 3. It is not determined that the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , or hypogonadotrophic hypogonadism . . . first manifested during active service and/or are medically related [to] active service. Therefore[,] it is not at least as likely as not that one or all of these disorders caused or permanently worsened or aggravated the claimed fatigue, . . . morbid obesity, . . . edema, skin tags, acanthosis nigricans, and striae. In general[,] hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , [and/or] hypogonadotrophic hypogonadism . . . may worsen or aggravate fatigue [and] morbid obesity, . . . and in turn[,] morbid obesity may worsen or aggravate dysmetabolic syndrome, . . . hypogonadotrophic hypogonadism, . . . fatigue, . . . and/or edema. However[,] these associations are not relevant to the case in review.
>
> My medical expert opinion is supported by integrating the data from the review of the claims file and the review of medical literature relevant to the claim in review. Specifically
>
> 1. Textbooks state that there is high prevalence of all claimed disorders in general population[.]
>
> 2. Review of the medical literature using professional website called PubMed that is the most common website used by physicians for literature searches shows multiple publications related to the Gulf War.

R. at 568-69.

In April 2014, the appellant submitted a lengthy challenge to the expert opinion. R. at 317-90. He asserted that the expert failed to review his claims file or service medical records, did not "perform adequate research" before reaching her conclusion, and was "completely unaware of the environmental exposures" relevant to his service. R. at 329. He further argued that the expert was "not competent enough" to provide an expert opinion in his case, citing her specialization in osteoporosis. R. at 331. Accordingly, he requested that the Board "disregard" the expert opinion.

R. at 329. The appellant also requested that the Board remand his appeal for the RO to consider his response in the first instance, R. at 317, and the Board did so in September 2014, R. at 295-301.

The RO issued a Supplemental Statement of the Case in October 2014 continuing to deny the appellant's claims. R. at 223-53. In a November 2014 response, the appellant again challenged the expert's competence. R. at 142-47. Upon return to the Board in June 2015, the Board sought an addendum opinion from the medical expert addressing the appellant's additional evidence and arguments. R. at 117-20. The expert provided the following addendum opinion in September 2015:

> 1. It is not at least as likely as not that the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , [or] hypogonadotrophic hypogonadism . . . first manifested during active service or are medically related to injury or disease in active service.
>
> 2. It is not at least as likely as not that [the appellant's] extreme weight gain of 58 pounds during active service caused or was an early manifestation of the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , [or] hypogonadotrophic hypogonadism . . . .
>
> 3. It is not determined that the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , [or] hypogonadotrophic hypogonadism . . . first manifested during active service and/or are medically related [to] active service. Therefore, it is not at least as likely as not that one or all of these disorders caused or permanently worsened or aggravated the claimed fatigue, . . . morbid obesity, edema, skin tags, acanthosis nigricans, and striae.

R. at 111. She further supported her conclusion by stating: "Publications relevant to Gulf War do not support the diagnoses in the cl[ai]m." R. at 112. In September 2016, the appellant again challenged the expert's competence to provide an opinion in his case. R. at 36-67.

In December 2016, the Board issued the decision on appeal, denying all the appellant's claims for benefits. Relevant to the issues on appeal, the Board found that obesity is "not a condition for which service connection can be granted." R. at 8. Regarding dysmetabolic syndrome, the Board explained that three possible components—hypertriglyceridemia, HDL, and fasting plasma glucose—are "abnormal laboratory findings, and not disabilities in and of themselves for which VA compensation benefits are payable." R. at 9 (citing 61 Fed. Reg. 20,440, 20,445 (May 7, 1996)). As to the other two possible components, the Board found that the appellant did not have hypertension and that, as stated above, obesity "is not listed in the rating schedule as a specifically ratable condition and there are no apparent manifestations of obesity that

may be ratable." *Id.* Accordingly, the Board concluded that the appellant was not entitled to benefits for metabolic syndrome because "it is not manifested by anything that would be ratable under VA's rating schedule." R. at 10. The Board relied on the expert medical opinion to deny the appellant's claims for benefits for hypothyroidism and hypogonadism and therefore also denied the appellant's claims for benefits for the secondary conditions. R. at 10-14. This appeal followed.

II. ANALYSIS

A. Pending Motions

On March 18, 2019, the appellant filed a motion for panel review and a motion for oral argument. The Secretary has not filed a response to either motion.

In his motion for panel review, the appellant argues that the U.S. Court of Appeals for the Federal Circuit's (Federal Circuit) recent decision in *Saunders v. Wilkie*, 886 F.3d 1356, 1363-64 (Fed. Cir. 2018), which defined "disability" in 38 U.S.C. § 1110 as the functional impairment of earning capacity, effectively overruled this Court's decision in *Marcelino v. Shulkin*, 29 Vet.App. 155, 158 (2018), which held that the Court lacks jurisdiction to determine whether obesity is or should be a disability for purposes of VA compensation. As will be explained in Part II.C below, however, *Marcelino* is still good law; therefore, the Court will deny the appellant's motion for panel review.

The Court will also deny the appellant's motion for oral argument. Generally, oral argument will be held when the Court determines that it will "materially assist" the Court in resolving the issue before it. *Beaty v. Brown*, 6 Vet.App. 532, 539 (1994); *see Winslow v. Brown*, 8 Vet.App. 469, 471 (1996); *Mason v. Brown*, 8 Vet.App. 44, 59 (1995). Because the Court concludes that this matter is squarely controlled by existing precedent, oral argument would not materially assist the Court. *See* U.S. VET. APP. R. 34(b) ("Oral argument normally is not granted on . . . matters being decided by a single Judge.").

B. Hypothyroidism and Hypogonadism

On appeal, the appellant argues that the Board erred in finding the expert medical opinion adequate to decide his claims for benefits for hypothyroidism and hypogonadism because, among other reasons, the expert failed to provide sufficient rationale for her conclusions. Appellant's Br. at 9-11. The appellant also contends that the Board erred in extending the medical expert the presumption of competence without addressing his specific challenges to her qualifications. *Id.* at

11-14. Finally, he asserts that the Board provided inadequate reasons or bases for discounting the favorable March 2010 VA examination. *Id.* at 14-17. The Secretary concedes that the Board provided inadequate reasons or bases for finding the medical expert opinion and addendum adequate. Secretary's Br. at 5-8. He also concedes that the Board failed to address the appellant's challenges to the expert's qualifications. *Id.* at 8-10. He argues, however, that the Board provided adequate reasons or bases for rejecting the March 2010 VA medical opinion. *Id.* at 17-18. Nevertheless, the Secretary concedes that the Court should vacate the Board's denial of benefits for hypothyroidism and hypogonadism and remand those claims for readjudication. *Id.* at 5.

The Court agrees that the Board provided inadequate reasons or bases for finding the medical expert opinion and addendum adequate. The Board found only that the appellant was "provided with VA examinations and [medical expert] opinions which, collectively, contain a description of the history of the disabilities at issue; document and consider the relevant medical facts and principles; and provide opinions regarding the etiology of the [appellant's] claimed conditions." R. at 15. As the Secretary concedes, the Board failed to address potential deficiencies in the expert's opinion, including whether it lacked sufficient rationale for the conclusions. Appellant's Br. at 10-11; Secretary's Br. at 5-7; *see* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1991).

The Court also agrees with the parties that the Board failed to adequately address the appellant's challenges to the medical expert's competence and qualifications. Although the Board acknowledged that the appellant had "contested" the expert's findings, it stated that, "[n]evertheless, 'the general presumption of competence includes a presumption that physicians remain up-to-date on medical knowledge and current medical studies.'" R. at 13 (quoting *Monzingo v. Shinseki*, 26 Vet.App. 97, 106-07 (2012) (per curiam)). When a claimant raises a specific challenge to an examiner's competence before the Board,[3] the Board must determine whether the presumption of competence has been rebutted. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009); *see also Parks*, 716 F.3d at 585-86 (explaining that "[t]he first step to overcoming the presumption [of competence] is to object, even where . . . the veteran is acting pro

[3] The Court notes that, with one exception, claimants are required to affirmatively challenge an examiner's competence before the Board; if they do not, the argument is waived. *Parks v. Shinseki*, 716 F.3d 581, 585-86 (Fed. Cir. 2013); *see Wise v. Shinseki*, 26 Vet.App. 517, 526-27 (2014) (holding that, where the face of the medical opinion shows some irregularity that raises the question of the examiner's competence, the presumption of regularity does not attach and the Board is required to address the examiner's competence sua sponte).

se"); *Sickels v. Shinseki*, 643 F.3d 1362, 1365 (Fed. Cir. 2011) (holding that the Board is not required to "give reasons and bases for concluding that a medical examiner is competent unless the issue is raised by the veteran" before VA, because such a requirement "would fault the Board for failing to explain its reasoning on unraised issues"); *Cox v. Nicholson*, 20 Vet.App. 563, 568-69 (2007) (noting that the record before VA contained no "argument or evidence" regarding a nurse practitioner's competence).

The parties disagree as to whether the question of an examiner's competence is a factual question that the Court reviews under the "clearly erroneous" standard of review, *see* Secretary's Br. at 9-11, or a legal question that the Court reviews de novo, *see* Appellant's Br. at 12. In light of the appellant's argument in his reply brief that the Court need not determine the proper standard of review because of the Secretary's concession that the Board should address the question in the first instance and the appellant's agreement that remand is the appropriate remedy, Reply Br. at 5-6, the Court will not decide this question at this time.

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant as to hypothyroidism and hypogonadism. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matters, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

C. Morbid Obesity, Dysmetabolic Syndrome, and Secondary Conditions

1. Jurisdiction

Here, the Board found that obesity "is not a condition for which [disability compensation] can be granted" and that "the rating schedule does not contemplate a separate disability rating for obesity." R. at 8. Additionally, the Board found that "metabolic syndrome does not satisfy the

requirement of a current disability because it is not manifested by anything that would be ratable under VA's rating schedule." R. at 10. The Board thus denied disability compensation for both conditions. R. at 5.

The appellant argues that the Court has jurisdiction to review the Board's findings that obesity and dysmetabolic syndrome are not disabilities for the purposes of 38 U.S.C. § 1110. Appellant's Br. at 18-26. In that regard, as noted above, he contends that this Court's decision in *Marcelino* was effectively overruled by the Federal Circuit's decision in *Saunders*. Appellant's Br. at 21. He further contends that, if the Court finds that it has jurisdiction, it should remand for the Board to determine under *Saunders* whether either condition results in functional impairment of earning capacity, rather than considering only whether any manifestations are listed in the rating schedule. Appellant's Br. at 26; Reply Br. at 6. The Secretary, relying on caselaw from this Court and the Federal Circuit, maintains that the Court lacks jurisdiction. Secretary's Br. at 18-26.

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2018).

In *Marcelino*, the appellant argued that whether obesity is a "disease" is a legal question that precedes the policy question of whether VA should compensate veterans for that condition. 29 Vet.App. at 157. The Court, however, found that "this argument is nothing more than a backdoor substantive challenge to the content of the rating schedule that this Court may not and will not entertain." *Id.* at 158; *see* 38 U.S.C. § 7252(b) ("The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule."). The Court stressed that, in *Wanner v. Principi*, the Federal Circuit held that "direct review of the content of the rating schedule is 'indistinguishable' from review of what should be considered a 'disability.'" *Id.* (quoting 370 F.3d 1124, 1131 (Fed. Cir. 2004)). Thus, the Court concluded that it "does not have jurisdiction to entertain the argument that obesity should be considered a *disability*."[4] *Id.* (emphasis added).

[4] In *Wingard v. McDonald*, the Federal Circuit identified three exceptions to the principle that this Court may not review the rating schedule: (1) a case involving a constitutional challenge, (2) a case involving an interpretation

To establish service connection, section 1110 requires a "disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. § 1110. *Saunders* held that "disability" in section 1110 "refers to the functional impairment of earning capacity, not the underlying cause of said disability." 886 F.3d at 1363. Although the appellant is correct that *Saunders* defined "disability," it did not, and could not, change the jurisdictional landscape under which this Court operates. *See Hayre v. Principi*, 15 Vet.App. 48, 51 (2001) ("Jurisdiction may not be 'assumed,' 'conceded,' or 'implied,' and cannot be bestowed on a court by the court itself, or any other court."), *aff'd*, 78 F. App'x 120 (Fed. Cir. 2003). To underscore this point, the Court notes that its jurisdiction-centric decision in *Marcelino* relied heavily on two Federal Circuit cases—*Wanner* and *Wingard*, *see Marcelino*, 29 Vet.App. at 157-58—and that the Federal Circuit in *Saunders* did not refer to either of those cases or suggest in any way that those cases are no longer good law, *see generally* 886 F.3d at 1360-69. Accordingly, the Court concludes that the caselaw addressing our jurisdiction under section 7252(b) is clear: The Court lacks jurisdiction to determine what conditions are or should be disabilities for VA compensation purposes. *See* 38 U.S.C. § 7252(b); *Wanner*, 370 F.3d at 1131; *Marcelino*, 29 Vet.App. at 158.[5]

Thus, the Court lacks jurisdiction to address the appellant's arguments that obesity and dysmetabolic syndrome constitute disabilities for purposes of VA disability compensation. Moreover, given this conclusion, the Court need not address the appellant's additional arguments as to whether the Board used an incorrect legal standard in determining that those conditions did not amount to disabilities or what standard it should apply on remand in assessing whether a current disability is present.

2. Equal Protection

The appellant argues that, even if the Court lacks jurisdiction to review the Board's determination that morbid obesity and dysmetabolic syndrome are not disabilities for VA purposes, the Court may review VA's actions to determine whether they comport with the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution. Appellant's Br. at 26-29.

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of language in the regulations with regard to the rating schedule, and (3) a case involving a purely procedural challenge to the Secretary's adoption of schedule regulations. 779 F.3d 1354, 1356-57 (Fed. Cir. 2015). The appellant's constitutional argument will be addressed below.

[5] The Court acknowledges the appellant's argument that *Marcelino* was incorrectly decided and should be overturned. *See* Appellant's Br. at 26. A precedential decision by a panel of the Court may only be overturned by the Court sitting en banc. The appellant has not moved for en banc consideration and the Court has already concluded that panel review of this matter is not necessary.

More specifically, he contends that VA's decision to "deny disability compensation to a particular class of veterans (in this case, those with obesity or dysmetabolic syndrome) violates the equal protection clause because it is not rationally related to a legitimate governmental purpose." *Id.* at 26. This argument, then, arises under *Wingard*'s first exception to the Court's inability to review the content of the rating schedule: a constitutional challenge. *See* 779 F.3d at 1356-57. The Court reviews constitutional questions de novo. *Buzinski v. Brown*, 6 Vet.App. 360, 365 (1994).

The Court declines to address the appellant's constitutional argument on the merits. First, in his principal brief, the appellant argues only that there is no rational basis for excluding obesity or dysmetabolic syndrome as disabilities for VA purposes. Appellant's Br. at 26-29. As the Secretary points out, however, the appellant does not argue that other similarly situated veterans are being treated differently than he is. Because "the first step in an equal protection case is determining whether the [claimant] has demonstrated that [he] was treated differently than others who were similarly situated to [him]," the appellant has not sufficiently alleged a constitutional violation. *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994); *see id.* ("Dissimilar treatment of dissimilarly situated persons does not violate equal protection."); Secretary's Br. at 27-28; *see also Gray v. McDonald*, 27 Vet.App. 313, 327-28 (2015) (finding no basis to assess an allegation of an equal protection violation in the absence of sufficient evidence that the appellant was similarly situated to other veterans).

Second, in his reply brief, the appellant contends that he is not required to demonstrate that he is similarly situated to other veterans to establish an equal protection violation because a Board decision "denying service connection for obesity and dysmetabolic syndrome is a facial classification that disadvantages veterans diagnosed with obesity or dysmetabolic syndrome by barring them from receiving a federal benefit." Reply Br. at 11. He does not, however, cite any authority for this proposition. *See id.* Accordingly, the Court finds the argument undeveloped and unsupported and will not address it. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped).

3. Secondary Conditions

Finally, the only arguments the appellant raises with respect to the Board's denial of benefits for the secondary conditions—fatigue, edema, skin tags, acanthosis nigricans, and striae—is that they are inextricably intertwined with his claims for benefits for morbid obesity and dysmetabolic syndrome. Appellant's Br. at 29-30. Because the Court is affirming the Board's

denial of benefits for morbid obesity and dysmetabolic syndrome, the Court will likewise affirm the Board's denial of benefits for the secondary conditions.

III. CONCLUSION

The appellant's motions for panel review and oral argument are denied. The appeal of the Board's December 8, 2016, decision denying entitlement to benefits for hypertension is DISMISSED. After consideration of the parties' pleadings and a review of the record, those portions of the Board's decision denying entitlement to benefits for hypothyroidism/CLT and hypogonadism are VACATED and the matters are REMANDED for further proceedings consistent with this decision. Those portions of the Board's decision denying benefits for morbid obesity, dysmetabolic syndrome, fatigue, edema, skin tags, acanthosis nigricans, and striae are AFFIRMED.

DATED: April 16, 2019

Copies to:

Christopher F. Attig, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 17-744

GARY R. LARSON, JR., APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: December 18, 2019

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Karen E. Meyers
Deputy Clerk

Copies to:

Christopher F. Attig, Esq.

VA General Counsel (027)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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

2. This brief contains 9,138 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

3. This motion 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).
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Respectfully Submitted,
Attig | Curran | Steel, PLLC

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

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Chris Attig — Name of Counsel

/s/ Chris Attig — Signature of Counsel

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