2020-1647

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GARY R. LARSON,
Claimant - Appellant

v.

DENIS McDONOUGH,
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 REPLY BRIEF

Chris Attig, Attorney
ATTIG | CURRAN | STEEL, PLLC
P.O. Box 250724
Little Rock, Arkansas 72225
Phone: (866) 627 - 7764

Counsel for Appellant

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2020-1647

Short Case Caption Larson v. McDonough

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: 02/24/2021

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		

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STATEMENT OF RELATED CASES

Mr. Larson has no related cases at the Veterans Court 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.

STATEMENT OF THE ISSUES

ISSUE #1

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

SUMMARY OF ARGUMENT IN REPLY

The Secretary concedes that Mr. Larson's claims to service-connect his obesity and DMS are at the current disability stage. Appellee Br. at 10, fn 4; Appellee Br. at 18, fn 9. His concession is necessary – it cannot be credibly argued otherwise.

This concession is important, as it narrows the dispute to a single issue: does the Veterans Court have jurisdiction to review a BVA determination that obesity and DMS cannot be service-connected as a matter of law?

Mr. Larson understands the Court's decision in *Saunders* to resolve that dispute. In *Saunders,* the Court laid out the proper legal test for what constitutes a current disability. *Saunders v. Wilkie,* 886

F.3d 1356 (Fed. Cir. 2018). The Court expressly found it had jurisdiction to address the issue. *Saunders,* 886 F.3d at 1361. The Court would not have ordered "Veterans Court to remand th[e] matter to the Board" to make findings of fact on the current disability element of that claim unless the Veterans Court had jurisdiction to review the BVA's decision on that issue. *Id,* at 1368 – 1369.

The Secretary responds with arguments that misdirect the Court's attention. He discusses the legislative history of a provision of a bill that never made it out of the Senate committee and that has nothing to do with the dispute in this appeal. He stretches *Wanner's* holding to ban judicial review of everything that "implicates the rating schedule." He argues that because existing statutes and regulations blur the line between up-stream service connection and down-stream rating considerations, the ban on judicial review of the contents of the VASRD includes review of what constitutes a disability. He does not reconcile his argument with a recent precedential decision wherein the Veterans Court not only exercised its jurisdiction to review a BVA decision that did not properly adjudicate the "current disability" element of a claim, but also concluded that the rating schedule may serve as a proxy for

determining whether certain manifestations may impair earning capacity and constitute a current disability. *Wait v. Wilkie*, 33 Vet. App. 8, 16 (2020). He tries to reframe the issue in *Saunders* to avoid its dispositive impact on this case. And he does not raise a serious dispute to the assertion that the consequence of his argument would be to create a veterans benefits system very different from the one Congress created.

Because the parties do not seriously dispute that the sole issue in this case involves whether the BVA used the correct legal test for current disability, *Saunders* controls the outcome of this appeal. The BVA committed the same legal error in this appeal as it did in its decision underlying *Saunders*: it failed to make any findings of fact as to whether Mr. Larson's obesity and DMS amount to functional impairments of his earning capacity.

If the Court agrees that the BVA erred in this way, then the parties appear to agree on the proper remedy: a remand of this matter to the BVA for factual findings under the correct legal test for a current disability.

To effectuate that remedy, Mr. Larson asks this Court to reverse the Veterans Court's decision that it lacks jurisdiction to review BVA's findings of fact as to the current disability element in a service connection claim. Mr. Larson also asks the Court to hold that its decision in *Saunders,* or its decision in this appeal, over-rule the Veterans Court's decision in *Marcelino v. Shulkin.*

ARGUMENT IN REPLY

1. The only issue in this appeal is whether the Veterans Court has jurisdiction to review BVA decisions that apply the wrong legal test for disability.

Mr. Larson, the Secretary and the Veterans Court all agree on the three elements of the *Shedden* test for service connection: a veteran must prove that his current disability has a nexus to an in-service event. Appx9, Appellee Br. at 10 fn 4, Appx9, App. Br. at 22 – 23.[1] It is not disputed that the BVA decision concluded that obesity and DMS do not satisfy the requirement of a current disability. Appx47-49.

[1] Mr. Larson's counsel apologizes to the Court and the Secretary for his scrivener's error in citing to the wrong reporter pages for *Shedden at* App. Br. 22-23. The correct citation is *Shedden v. Principi,* 381 F.3d 1163, 1166-67 (Fed. Cir. 2004).

The Secretary and Mr. Larson agree that "[t]he dispute here regarding Mr. Larson's obesity and DMS implicates" the current disability element of the *Shedden* test. Appellee Br. at 10 fn. 4; App. Br. at 23, 39.

The Secretary's arguments as to whether and how he might eventually rate Mr. Larson's obesity and DMS, and whether the Veterans Court would have jurisdiction to review those ratings in the future, are unripe and immaterial.

Because the question of whether obesity and DMS can constitute current disabilities for service-connection purposes is identical to the question presented in *Saunders* (can stand-alone pain can constitute a current disability for service-connection purposes), the Court can accept the Secretary's concession, apply its holding in *Saunders,* and order the Veterans Court to return the matter to the BVA to determine whether Mr. Larson's obesity and DMS constitute a functional impairment of his earning capacity.

2. The Secretary's arguments are distractions from the only issue in this appeal.

2.1. The contents of the VASRD do not deprive the Veterans Court of jurisdiction; they assist the Veterans Court in its review of BVA decisions that apply the wrong test for disability.

The Secretary spills a lot of ink trying to untether *Wanner's* holding from its down-stream moorings. He asks the Court to extend the ban on judicial review of the Secretary's adoption or revision of the contents of the VASRD to everything that "implicates the rating schedule."

The Secretary does not reconcile his expansive interpretation of *Wanner* with the dispute underlying that appeal. Thirteen years before even filing the increased rating claim that ultimately led to the Court's decision in *Wanner,* the Secretary acknowledged that veteran's tinnitus was a current disability and awarded him service-connection of his tinnitus. *Wanner v. Principi,* 370 F.3d 1124, 1126 (Fed. Cir. 2004). Years later, the veteran in *Wanner* challenged a *rating* regulation in the VASRD that limited compensable ratings for service-connected tinnitus to tinnitus that resulted from acoustic trauma. *Id*. The Veterans Court reviewed the VASRD regulation and this Court found that review

exceeded the lower court's jurisdiction. *See Wanner,* 370 F.3d at 1127 – 1128, 1131. Because *Wanner* dealt only with a dispute over the tinnitus rating, its holding is cabined to the review of ratings, and does not extend to up-stream determinations of what constitutes a current disability.

The premise of the Secretary's attempt to distinguish *Wanner* is his argument that existing statutes and regulations blur the line between up-stream service connection and down-stream rating considerations. *See* Appellee Br. 16 – 18.

For example, he argues that 38 U.S.C. §1117(a)(1)(B) is an example of a statute that blurs that line because it uses rating criteria to define the existence of a current disability. *See* Appellee Br. at 8. The Secretary is wrong. Section 1117(a)(1)(B) creates a legal presumption – a shortcut to avoid the more burdensome proof of a direct *nexus* between a current disability and military service. 38 U.S.C. §1117(a)(1)(B). A veteran denied the presumption of nexus for what the statute calls a "qualifying chronic disability" can still establish direct nexus between his service and his "qualifying chronic disability." *See e.g., Atencio v. O'Rourke,* 30 Vet. App. 74, 79 – 80 (2018)(addressing

both the presumptive and direct nexus theories in a Section 1117 appeal). A separate part of the statue – which the Veterans Court can and has reviewed – defines which "qualifying chronic disability[ies] are entitled to that presumption. 38 U.S.C. §1117(a)(2); *see Atencio v. O'Rourke,* 30 Vet. App. At 80 – 85.

In the end analysis, though, the Veterans Court has itself rejected the argument the Secretary advances here.

Days after Mr. Larson filed his opening brief in this case, and months before the Secretary filed his response, the Veterans Court acknowledged that its jurisdiction extends to the review of BVA decisions that did not properly adjudicate the "current disability" element of a claim. *Wait v. Wilkie,* 33 Vet. App. at 10. In that decision, the "[Veterans] Court conclude[d] that the rating schedule may serve as a proxy for determining whether certain manifestations may impair earning capacity." *Wait v. Wilkie*, 33 Vet. App. at 16. The Secretary did not appeal that decision, and the Veterans Court's mandate issued on November 17, 2020, roughly one month before the Secretary filed his response brief in this case. *Wait v. Wilkie,* CAVC #18-4349, *CAVC Mandate* (November 18, 2020), found at:

https://efiling.uscourts.cavc.gov/cmecf/servlet/TransportRoom?servlet=CaseSummary.jsp&caseNum=18-4349&incOrigDkt=Y&incDktEntries=Y (last visited February 24, 2021).

Though not binding on this Court, the *Wait* decision is significant. The Veterans Court concluded the exact opposite of what the Secretary argues here; it reasoned that the rating criteria for a particular condition in the VASRD does not *deprive* the Veterans Court of jurisdiction but instead *assists* the Veterans Court in the exercise of its jurisdiction to review BVA decisions that apply the wrong test for disability. *See Wait,* 33 Vet. App. at 15 – 17. As the court wrote, the VASRD is "relevant and instructive with regard to whether an individual veteran with similar manifestations has functional impairment of earning capacity." *Id.*

2.2. One Senator's statement introducing a bill that never became law is immaterial to the dispute in this appeal.

The Secretary quotes a single statement from a single Senator who introduced legislation in a Congressional committee thirteen years ago. Appellee Br. at 24 – 26, *citing* 154 Cong. Rec. S. 1819, 1819-1820. Senator Akaka's statement is immaterial to this appeal. His proposed legislation, which never became law, was intended to give the Veterans

Court jurisdiction to review a challenge to "the absence of a rating for a condition mandated by statute." *Id.*

That is not the case here. There is no Congressional mandate to specifically publish regulations rating obesity or DMS. And the Supreme Court has urged courts looking to legislative history to be "wary about expecting to find reliable interpretive help outside the record of the statute being construed." *Doe v. Chao*, 540 U.S. 614, 626 (2004).

As the Secretary concedes, this case involves Veterans Court review of the test for "current disability." It does not involve the Veterans Court review of the Secretary's abrogation of his rule-making authority in the face of a specific Congressional mandate. The legislative history of a bill that never became law does not inform the correct legal test for "current disability." Nor does that legislative history obviate the Veterans Court's obligation to review BVA decisions that apply the wrong test for current disability, as required in *Saunders*.

2.3. The issue in *Saunders* cannot be reframed to avoid its clear application to this appeal.

In *Saunders,* the Court found that it had "jurisdiction to review" whether "statutory language [in §1110] instructs or permits finding that pain can serve as a disability." *Saunders,* 886 F.3d at 1362. It necessarily follows that the Veterans Court has "jurisdiction to review" whether that same statutory language instructs or permits finding that obesity or DMS can serve as a disability.

The Secretary's response struggles to reframe the issue in *Saunders* to avoid its clear application to this appeal. Appellee Br. 20 – 24. He writes that "the question at issue in *Saunders* was the *Veterans Court's* legal interpretation of Section 1110, not any *VA* choice regarding 'disability' status and the schedule." Appellee Br. at 21 (emphasis in original). This contrast is flawed, as the Court faces the same question in this case that it faced in *Saunders* – does the BVA commit legal error when it fails to make findings of fact and applies the wrong legal test for the "current disability" requirement in a service-connection claim. In both cases, the BVA applied the wrong, albeit different, legal tests for what constitutes a disability under §1110. In

both cases, the Veterans Court has jurisdiction to review the BVA's failure to apply the correct legal test for disability.

2.4. The Court cannot create a veterans benefits system different from the one Congress created.

Mr. Larson argued that if the Court were to affirm the Veteran's Court's decision, veterans who were denied service-connection of disabilities like obesity and DMS would be deprived of an array of pecuniary and non-pecuniary benefits that help them successfully reintegrate into civilian life. *See* App. Brief 25 – 33.

The Secretary does not seriously engage with or dispute this argument. He does not dispute that the first consequence of his argument is that a veteran whose only disability is the functional impairment resulting from obesity or DMS, which in turn have a nexus to a toxic exposure or a physical injury in-service, would be denied a federal hiring preference, access to military commissaries and recreation (MWR) facilities, waiver of the funding fee for a VA home loan, and burial and plot allowances. Nor does he dispute that the second consequence of his argument is that the veteran would have no right to judicial review of those benefits denials.

Instead, the Secretary merely shrugs off these deleterious results with conclusory statements that they are "policy argument[s]" that have "absolutely no truth," and constitute "pure misdirection." Appellee Br. at 26 – 27. "[T]his appeal involves Mr. Larson," he writes, noting Mr. Larson is already eligible for some of these "other VA and non-VA benefits." Appellee Br. at 28, fn 28.

Mr. Larson urges the Court to reject the Secretary's argument, as adopting it to affirm the Veterans Court will create a veterans benefits system very different than the one Congress created.

3. The Court's decision in *Saunders* controls the outcome of this appeal.

Mr. Larson did not ask this Court or the Veterans Court to find that "obesity and DMS should be considered section 1110 disabilities." *Cf.* Appellee Br. at 29. He instead asked the Court to remand his appeal to the BVA to "readjudicate the appeal by applying the correct legal definition of disability as per *Saunders*." App. Br. at 49.

The Secretary makes no argument that DMS cannot impair a person's ability to function and earn a living. And he makes no serious argument that obesity cannot, as a matter of law, impair a person's ability to function and earn a living.

Like the appellant in *Saunders,* Mr. Larson argued that "obesity [can] cause a functional impairment by diminishing the body's ability to function." App. Br. at 45. Just as in *Saunders*, the Secretary's own rating regulations treat obesity as a form of functional impairment. *See Saunders*, 886 F.3d at 1365; App. Br at 45; *accord* 38 C.F.R. §4.119 (DC 7907). The Secretary's position that obesity as a rating criteria "signifies a higher level of Cushing's Syndrome impairment, [and] not that obesity itself impairs earning capacity" does not square with the Court's finding in *Saunders* that "the percentages in the disability rating schedule represent as far as can practicably be determined the average impairment in earning capacity resulting from all types of disease and injuries." *Contrast* Appellee Br. at 30; *Saunders*, 886 F.d at 1362 – 1363 (internal quotation marks omitted). Nor does his argument square with the Veterans Court's own holding that the VASRD is "relevant and instructive with regard to whether an individual veteran with similar manifestations has functional impairment of earning capacity." *Wait,* 33 Vet. App. at 10.

The Secretary also argued that obesity cannot cause a functional impairment of earning capacity because it is "effectively a laboratory

test result" marking a "state of having an excess amount of body fat, as determined by height or weight." Appellee Br. at 31 – 32. It does not follow that obesity cannot cause a functional impairment of earning capacity because it is diagnosed by use of a physical measurement. If that were true, diabetes could never impair earning capacity because it is diagnosed by use of a laboratory test measuring blood sugar. Hypertension could not impair earning capacity because it is diagnosed based on blood pressure test results.

The parties agree that if the Court finds that the BVA failed to apply the correct legal test for a current disability, it follows that it cannot be known whether Mr. Larson's obesity and DMS are current disabilities "without the requisite factfinding [by the BVA] regarding the nature of [his] obesity and DMS" or whether they cause a functional impairment of Mr. Larson's earning capacity. Appellee Br. at 30; *accord,* App. Br. at 47.

Saunders was clear in its holding. The BVA errs when it does not apply the correct legal test for disability, and the BVA must make findings of fact to determine whether a particular condition results in a

functional impairment of earning capacity. The Veterans Court must return decisions that fail to do so to the BVA.

Because the BVA's error in this case is the same as the error it committed in *Saunders,* the Court's decision in *Saunders* controls the outcome of this case.

Here, the BVA applied the wrong legal test for disability, concluding that only conditions with ratable symptoms can be a current disability. Appx23-25. Because the BVA did not make findings of fact using the correct test for disability under 38 U.S.C. §1110, the remedy in *Saunders* is the appropriate remedy here. *Saunders*, 886 F.3d at 1360.

CONCLUSION & REMEDY

Mr. Larson respectfully requests that the Court 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. He respectfully requests that the Court reverse the Veterans Court's finding that §7252(b) barred it from reviewing the BVA's finding that obesity and DMS are disabilities that cannot be service-connected as a matter of law. 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,* 29 Vet. App. 155 (2018).

Respectfully Submitted,
ATTIG | CURRAN | STEEL, PLLC

By: */s/ Chris Attig*

Chris Attig, Attorney
Texas Bar No. 24055119
P.O. Box 250724
Little Rock, Arkansas 72225
Phone: (866) 627-7764
Facsimile: (214) 741-2337

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Respectfully Submitted,
ATTIG | CURRAN | STEEL, PLLC

By: */s/ Chris Attig*

Chris Attig, Attorney for Appellant
Texas Bar No. 24055119
P. O. Box 250724
Little Rock, Arkansas 72225
Phone: (866) 627 – 7764
Email: chris@attigsteel.com

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

Law Firm	Attig | Curran | Steel, PLLC
Address	P.O. Box 250724
City, State, Zip	Little Rock, Arkansas 72225
Telephone Number	(866) 627 - 7764
Fax Number	(214) 741 - 2337
E-Mail Address	chris@attigsteel.com

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