No. 2020-1647

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GARY R. LARSON, JR.,
Claimant-Appellant,

v.

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

Appeal from the United States Court of Appeals for Veterans Claims
in case no. 17-0744, Judge Meredith

BRIEF FOR RESPONDENT-APPELLEE

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December 18, 2020

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Pursuant to Rule 47.5 of this Court's Rules, counsel for respondent-appellee states that he is unaware of any other appeal from this civil action that previously was before this Court or any other appellate court under the same or similar title. Counsel is also unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

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v.	)	No. 2020-1647
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BRIEF FOR RESPONDENT-APPELLEE

STATEMENT OF THE ISSUE

Whether the United States Court of Appeals for Veterans Claims (Veterans Court) has jurisdiction to determine what should be considered a disability for Department of Veterans Affairs (VA) compensation purposes.

STATEMENT OF THE CASE SETTING OUT RELEVANT FACTS

I. Nature Of The Case.

Claimant-appellant Gary R. Larson, Jr., appeals the decision of the Veterans Court in *Larson v. Wilkie*, No. 17-0744 (Vet. App. Apr. 16, 2019), which affirmed that part of a December 8, 2016, Board of Veterans' Appeals (board) decision

denying Mr. Larson disability compensation for obesity and dysmetabolic syndrome (DMS). Appx1-12.[1]

II. Statement of Facts and Course of Proceedings Below

A. Mr. Larson Requests VA Benefits For Multiple Conditions

Mr. Larson served a period of active duty for training (ACDUTRA) in the United States Navy Reserves from June to November 1988, and served on active duty in the Navy from February 1989 to February 1993 (including service in the Persian Gulf). Appx2. The record reflects that Mr. Larson gained a substantial amount of weight (1) before entering ACDUTRA, (2) before and during his active duty Persian Gulf deployment, and (3) after his service. *See* Appx362 (22 pounds gained between November 1987 and June 1988); Appx371, Appx384 (48 pounds gained between February 1989 and May 1991); Appx393, Appx339 (64.5 pounds gained between April 1993 and July 1997).

In August 2009, Mr. Larson filed a claim for VA disability compensation for multiple conditions, including hypothyroidism, hypogonadism, DMS, hypertension, obesity, edema, and fatigue — alleging a cause of "exposure to chemicals and vaccines" during service. Appx2. VA obtained an April 2010 medical opinion and July 2010 addendum addressing Mr. Larson's conditions, and

[1] "Appx__" refers to pages of the joint appendix filed in this case.

ultimately denied the claim in October 2010. Appx3. Mr. Larson appealed to the board, which secured a February 2014 medical opinion and September 2015 addendum. Appx3-5. The addendum opinion found that it was *not* "as likely as not" that (1) Mr. Larson's claimed hypothyroidism, DMS, hypogonadism, or hypertension were related to injury or disease in active service, (2) Mr. Larson's in-service weight gain was a manifestation of the claimed hypothyroidism, DMS, hypogonadism, or hypertension, or that (3) the claimed hypothyroidism, DMS, hypogonadism, or hypertension caused or aggravated the claimed fatigue, obesity, or edema. Appx5.

B. The Board Affirms VA's Initial Decision On Mr. Larson's Claim

In a December 8, 2016 decision, the board affirmed VA's denial of Mr. Larson's claim. Appx17-33. As to hypertension, the board found that the evidence preponderated against finding that Mr. Larson had a current hypertension disability. Appx22-23. As to hypothyroidism, hypogonadism, fatigue, and edema, the board found that the evidence preponderated against finding that these conditions were related to Mr. Larson's service. Appx25-29.

As to DMS, the board explained that DMS is not a disability in and of itself, but is a label given to individuals who present with a combination of three abnormal laboratory test results—e.g., a high fasting plasma glucose level, a low level of high-density lipoproteins (HDL), and excessive triglycerides in the blood

(hypertriglyceridemia).[2] Appx24 (citing *Schedule for Rating Disabilities; Endocrine System Disabilities*, 61 Fed. Reg. 20, 440, 20,445 (May 7, 1996) (VA does not consider abnormal laboratory test results, in and of themselves, as disabilities)). Consistent with Mr. Larson's submissions to it, the board noted that DMS, though generally associated with risk for other disabilities, had no manifestations itself that would be ratable under VA's rating schedule. Appx25; *see* Appx64 (Mr. Larson's contention that DMS is "a non-symptom-based medical condition" that is a risk factor for other diseases).[3]

As to obesity, the board found that obesity is a label given to individuals with an excessive accumulation of fat in the body, but is not acknowledged by VA's rating schedule as a disability in and of itself. Appx23; *see also Dorland's* at

[2] *Accord* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1839 (32d ed. 2012) (DMS is "a combination including at least three of the following: abdominal obesity, hypertriglyceridemia, low level of [HDL], hypertension, and high fasting plasma glucose level. It is associated with increased risk for development of diabetes mellitus and cardiovascular disease.") [hereinafter *Dorland's*].

[3] Mr. Larson's description of DMS on appeal quotes an article that, Mr. Larson admits, "was not in the record before the [board] or the Veterans Court." Appellant's Brief (App. Br.) at 6. Thus, that description may not be considered by this Court. 38 U.S.C. § 7252(b). Rather, this Court is bound by the board's factual finding as to the nature of DMS. 38 U.S.C. § 7292(d)(2). In any event, as noted above, the board's characterization is consistent with *Dorland's* and Mr. Larson's pleadings below. *See supra* at n.2; Appx440 (Mr. Larson characterizing DMS as a combination of medical findings—"when combined together then you get the diagnosis of metabolic syndrome"); Appx162 (same); *see also* Appx271 (VA medical report stating DMS is "not a specific constilation [sic] of symptoms").

1309 (obesity is "an increase in body weight beyond the limitation of skeletal and physical requirement, as the result of an excessive accumulation of fat in the body"). The board noted that, though potentially associated with other disabilities, obesity itself was not a ratable condition. Appx23-24.

C. The Veterans Court Refuses To Entertain Mr. Larson's "Backdoor Substantive Challenge To The Content Of The Rating Schedule"

Mr. Larson appealed to the Veterans Court and urged the court to review whether obesity and DMS are disabilities for purposes of 38 U.S.C. § 1110. Appx9. He acknowledged that *Marcelino v. Shulkin*, 29 Vet. App. 155 (2018), held that 38 U.S.C. § 7252(b) precluded such review as to obesity, but nevertheless argued that *Saunders v. Wilkie,* 886 F.3d 1356 (Fed. Cir. 2018), changed the section 7252(b) calculus. Appx6; Appx9.

In an April 16, 2019 memorandum decision, the Veterans Court rejected the notion that *Saunders* altered the court's statutory jurisdiction. Appx10. The court noted that *Marcelino* relied on the interpretation of section 7252(b) provided in *Wanner v. Principi*, 370 F.3d 1124, 1129 (Fed. Cir. 2004), and *Wingard v. McDonald*, 779 F.3d 1354, 1357-59 (Fed. Cir. 2015); and *Saunders* neither mentioned those precedents nor suggested that they are no longer good law. Appx10. Accordingly, the court held, though *Saunders* provided a general definition of section 1110 disability, it "did not, and could not, change the jurisdictional landscape under which this [c]ourt operates." *Id.*

Turning to Mr. Larson's argument that obesity and DMS should be considered disabilities for VA compensation purposes, the court held that such a "backdoor substantive challenge to the content of the rating schedule" was foreclosed by section 7252(b), *Wanner*, and *Marcelino*. Appx9 (internal quotation marks omitted). Because "review of what should be considered a disability" is indistinguishable from "direct review of the content of the rating schedule," Appx9 (citing *Wanner*, 370 F.3d at 1131), the court held, "th[is c]ourt lacks jurisdiction to determine what conditions are or should be disabilities for VA compensation purposes." Appx10.

Thus, the Veterans Court affirmed the board's conclusions on obesity, DMS, and the conditions (fatigue, edema, etc.) claimed as secondary to obesity and DMS. Appx11-12. Nevertheless, the court vacated the board's conclusions on hypothyroidism and hypogonadism, finding that remand was warranted for the board to further address the sufficiency of the record medical evidence on those conditions. Appx6-8.

Mr. Larson filed a motion for reconsideration or, in the alternative, panel review of the court's decision. Appx14-15. On September 19, 2019, the motion for reconsideration was denied and a Veterans Court panel held that the April 2019 memorandum decision would remain the decision of the court. *Id.* Mr. Larson subsequently filed a motion for full-court review, which was denied on December

18, 2019. Appx16. Judgment was entered that day, and this appeal followed. Appx13.

SUMMARY OF THE ARGUMENT

In the decision on appeal, the Veterans Court held that it lacked jurisdiction over Mr. Larson's argument that obesity and DMS should be considered "disabilities" for VA compensation purposes. The Veterans Court's assessment of its own jurisdiction is undoubtedly correct. As this Court held in *Wanner*, "review of 'what should be considered a disability'" is "indistinguishable" from "direct review of the content of the rating schedule," which the Veterans Court statutorily may not review. 370 F.3d at 1131 (citing 38 U.S.C. § 7252(b)).

On appeal, Mr. Larson attempts to evade *Wanner* by arguing that his case is distinguishable, that *Wanner*'s statement above was dicta, and that *Wanner* was implicitly overruled by this Court's recent decision in *Saunders*. Each argument lacks merit.

First, though Mr. Larson asserts that his case at this juncture involves service connection, not compensation level, *Wanner* held that section 7252(b) precludes judicial review over VA selections for "both the ratings *and the injuries for which the ratings are provided*" in the schedule. 370 F.3d at 1131 (emphasis added). Moreover, it is clear from the 38 U.S.C. chapter 11 statutory scheme that finding a condition to be a disability for "service connection" purposes necessitates the

assignment of a section 1155 disability rating—which directly implicates the content of the rating schedule.

Second, the statement in *Wanner* that forecloses Mr. Larson's argument here was not dicta, but was fundamental to deciding the case. The appellants in *Wanner* argued (like Mr. Larson here) that the section 7252(b) preclusion was limited to disability rating disputes—and the case could not have been resolved without the Court addressing their argument and explaining that, in fact, section 7252(b)'s preclusion is broader.

And third, a panel decision (*Saunders*) that did not even *mention* section 7252(b) cannot possibly overrule *Wanner*'s interpretation of section 7252(b). In *Saunders*, this Court reviewed the Veterans Court's legal interpretation of section 1110, not any VA choice as to the content of the schedule. Thus, there is nothing to be learned about the operation of section 7252(b) from *Saunders*.

This Court should affirm.

ARGUMENT

I. Jurisdiction

Pursuant to 38 U.S.C. § 7292(a), this Court has jurisdiction to review a Veterans Court's decision with respect to the validity of a decision on a rule of law or to the validity or interpretation of any statute or regulation relied on by the Veterans Court in making that decision. But this Court may not review "a refusal

[of the Veterans Court] to review the schedule of ratings for disabilities adopted under section 1155 of this title." *Id.* In other words, when entertaining an appeal of a Veterans Court decision (as here), this Court may not review VA selections for the rating schedule. *Wingard*, 779 F.3d at 1359-60.

This Court also may not "review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case," except to the extent that the appeal presents a constitutional issue. 38 U.S.C. § 7292(d)(2); *see Conway v. Principi*, 353 F.3d 1369, 1372 (Fed. Cir. 2004) (this Court reviews questions of law, not applications of law to fact).

II. The Veterans Court May Not Review "What Should Be Considered A Disability"

Before the Veterans Court, Mr. Larson asked the court to hold that obesity and DMS are "disabilities" under 38 U.S.C. § 1110. Appx9. The Veterans Court declined jurisdiction over that argument, understanding it to be "nothing more than a backdoor substantive challenge to the content of the rating schedule," precluded by 38 U.S.C. § 7252(b). Appx9 (quoting *Marcelino*, 29 Vet. App. at 158). As demonstrated below, the Veterans Court's decision is entirely consistent with this Court's precedents holding that section 7252(b) precludes Veterans Court review over "what should be considered a disability." *Wanner*, 370 F.3d at 1131.

A. Section 7252(b) Precludes Review Of Both The Ratings *And* The "Injuries For Which The Ratings Are Provided" In The Schedule

In 38 U.S.C. § 1110, Congress provided that the United States will pay veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty. . . ."[4] The payment depends upon the disability's assigned rating, 38 U.S.C. § 1114, and the assigned rating is governed by VA's schedule for rating disabilities, 38 U.S.C. § 1155. This rating schedule is to provide "ten grades of disability" based upon the average impairments of earning capacity from specific injuries or combination of injuries, and is to be readjusted by VA from time to time in accord with experience. *Id.*

In the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A., Tit. III, § 301(a) (1988), 102 Stat. 4105, 4113, Congress established the Veterans Court and authorized it to review board decisions, but placed a critical limitation on its jurisdiction, which currently reads: "The [c]ourt 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." 38 U.S.C. § 7252(b).

[4] Service connection, and section 1110 payment, thus requires "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service." *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004). The dispute here regarding Mr. Larson's obesity and DMS implicates element (1); the board rendered no findings on elements (2) and (3). *See* Appx23-25.

Other provisions of the VJRA reinforced this limitation. *See* Pub. L. 100-687, Div. A., Tit. I, § 102(a)(1) (judicial review precluded for "action relating to the adoption or revision of the schedule of ratings for disabilities"[5]); *id.* at Tit. III, § 301(a) (this Court may not review a "refusal [of the Veterans Court] to review the schedule of ratings for disabilities"); *see generally Wingard*, 779 F.3d at 1357-59 (discussing these provisions, which are now located at 38 U.S.C. §§ 502 and 7292(a)).

Based on this statutory scheme, this Court has held that the Veterans Court is precluded from reviewing "all content of the ratings schedule as well as the Secretary's actions in adopting or revising that content." *Wanner*, 370 F.3d at 1129. In *Wanner*, the appellants argued to the Court that section 7252(b)'s preclusion was "limited to the percentages of the disability ratings" in the schedule. *Id.* at 1129-30. The Court rejected that argument, stating that "the schedule consists of both the ratings *and the injuries for which the ratings are provided*;" section 7252(b) "broadly preclud[es] judicial review of the contents of the disability rating schedule *in toto*." *Id.* at 1130-31 (emphasis added). The Court held that a review of the schedule's compliance with 38 U.S.C. § 1110, as the Veterans Court had done in that case (*see id.* at 1127-28), "amounts to a direct

[5] As discussed *infra* at Argument II.E, this provision was amended in 2008 to allow for direct review by this Court, but not the Veterans Court. *See* 38 U.S.C. § 502; Pub. L. 110-389, Tit. I, § 102 (2008), 122 Stat. 4145, 4148.

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." *Id.* at 1131.

Other Court precedent has similarly held that challenges "as to what the schedule should contain"—or arguments that the content selected for the schedule violates section 1110—are barred by section 7252(b). *Fugere v. Derwinski*, 972 F.2d 331, 335 (Fed. Cir. 1992); *Wingard*, 779 F.3d at 1356-57 (Veterans Court lacks jurisdiction over appellant's challenge to the schedule's compliance with 38 U.S.C. §§ 1110 and 1155). In sum, the Court's "precedent is clear" that section 7252(b) "speaks broadly" and precludes review over what injuries or disabilities are included—and excluded—from the schedule. *Id.* at 1357 (internal quotation marks omitted); *Wanner*, 370 F.3d at 1131 (Secretary's "content selected[ ] is insulated from judicial review").

Here, Mr. Larson does not dispute that obesity and DMS are not recognized in VA's rating schedule, or that VAOPGCPREC 1-2017 (Jan. 6, 2017) has explained the basis for that exclusion, Appx450-459,[6] but nevertheless argues that obesity and DMS should be considered disabilities under 38 U.S.C. § 1110. App.

[6] Mr. Larson questions the persuasive value of VAOPGCPREC 1-2017, App. Br. at 41-44, but he does not dispute that it lays out the rationale for this longstanding exclusion.

Br. at 44-46. Simply put, *Wanner* forecloses his argument: His challenge over "what should be considered a disability" is "indistinguishable" from "direct review of the content of the rating schedule" and is therefore barred under section 7252(b). *Wanner*, 370 F.3d at 1131; *see also Marcelino*, 29 Vet. App. at 158 (argument that obesity should be considered a disease is "nothing more than a backdoor substantive challenge to the content of the rating schedule").

B. Reviewing "What Should Be Considered A Disability" Is No Different From Reviewing "What Is Entitled To A Disability Rating"

Mr. Larson attempts to avoid *Wanner* through three maneuvers. *See* App. Br. at 35 (recognizing that "*Wanner* is the fulcrum on which" the Veterans Court's decision rests). First, he contends that the challenge at issue in *Wanner* involved compensation level, and his case at this juncture only involves the question of service connection. *See id.* at 26-30, 35-37. He believes that section 7252(b) only precludes review over the "down-stream" issue of compensation level ("degree of disability"). *Id.* at 29-30.

But this assertion seems to be a new spin on the exact argument presented in *Wanner*. In that case, the appellants argued that the section 7252(b) bar is "limited to the percentages of the disability ratings." 370 F.3d at 1129-30. The Court held otherwise: section 7252(b) "broadly preclud[es] judicial review of the contents of the disability rating schedule in toto," which includes "both the ratings *and the injuries for which the ratings are provided*." 370 F.3d at 1130-31 (emphasis

added). In other words, questions over which injuries or disabilities may even *receive* a disability rating implicate the content of the rating schedule. That is precisely why *Wanner* considered a challenge to "what should be considered a disability" as "indistinguishable" from "direct review of the content of the rating schedule." *Id.* at 1131; *see also Marcelino*, 29 Vet. App. at 158.

And that is the fundamental problem with Mr. Larson's view of the section 7252(b) bar. It is true that, in a veteran's case, there is the "up-stream element of service-connectedness" that precedes the "down-stream element of compensation level." *Grantham v. Brown*, 114 F.3d 1156, 1158-1159 (Fed. Cir. 1997). But, as conceded by Mr. Larson, when the requirements for service connection are satisfied under section 1110, it necessarily entails (per section 1114) the provision of a disability rating under section 1155 and the rating schedule. *See* App. Br. at 28 ("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."' (quoting *West v. Brown*, 7 Vet. App. 329, 336 (1995)). Because of the inextricable link between these sections, Mr. Larson's contention that his challenge only involves service connection or section 1110 is unavailing. His argument that obesity and DMS constitute section 1110 disabilities is *indistinguishable* from an argument that VA (through its section 1155 schedule) must provide disability

ratings for obesity and DMS.[7]

Amicus attempts to isolate these statutory provisions, arguing that (1) section 1110 invokes the term "disability," not the phrase "condition listed on the ratings schedule," and (2) section 1155 "does not empower the Secretary to, in the ratings schedule, deem a condition to be not disabling." Am. at 7 n.3,17-18. But VA was granted the discretion to assess the *extent* to which a condition impairs earning capacity (and to construct the section 1155 schedule accordingly). Therefore, it defies logic that VA would not be able to assess whether a condition affects earning capacity (and thus warrants inclusion in the schedule) in the first instance. *See* 38 U.S.C. § 1155 (Secretary shall adopt a schedule, and readjust it from time to time in accordance with experience); *see also Vazquez-Flores v. Shinseki*, 580 F.3d 1270, 1280 (Fed. Cir. 2009) (the rating schedule consists of "those regulations that *establish disabilities* and set forth the terms under which compensation shall be provided" (citing *Martinak v. Nicholson*, 21 Vet. App. 447, 451 (2007)) (emphasis added)). And the link allegedly lacking in the terminology of section 1110 is clearly laid out in the statutory scheme, given that section 1110

[7] Mr. Larson concedes that the Veterans Court cannot "determine whether or not the Secretary should 'adopt and apply a schedule of ratings' for obesity and/or DMS," App. Br. at 20, but he asked the Veterans Court to grant disability status, and consequently disability ratings, for these two conditions, Appx9. These two positions cannot be reconciled.

"disability" status necessarily entails, under section 1114, the assignment of a disability rating under the section 1155 rating schedule.

To be clear, we do not wish to mitigate the difference between the upstream issue of service connection and downstream issue of compensation level. But Mr. Larson's argument, *see* App. Br. at 32, seems to be premised entirely on the existence of an ironclad barrier between those issues—with section 7252(b) only operating on the compensation side of the barrier—when, as *Wanner* recognized, and as a practical matter, that is too limited a conception. For instance, the part of the Code of Federal Regulations titled the "Schedule for Rating Disabilities," 38 C.F.R. part 4, contains instructions on not just compensation level, but also the existence of a disability for VA purposes. Specifically,

- 38 C.F.R. § 4.9 provides that congenital or developmental defects and other disorders are not "diseases or injuries" for VA purposes;
- 38 C.F.R. § 4.57 provides the same for congenital bilateral flatfoot;
- 38 C.F.R. § 4.127 provides the same for intellectual disabilities and personality disorders;
- 38 C.F.R. § 4.150 (in the note to Diagnostic Code 9913) provides that periodontal disease is not a disability for VA purposes, *see Byrd v. Nicholson,* 19 Vet. App. 388 (2005); and
- 38 C.F.R. §§ 4.125(a) and 4.130 provide that a mental condition without a DSM-5 diagnosis is not a disability for VA purposes, *see Martinez-Bodon v. Wilkie*, 32 Vet. App. 393 (2020).

For this reason, review of the "Schedule for Rating Disabilities" may be necessary

at the service connection stage of a case.[8]

This Court acknowledged as much in *Saunders*, 886 F.3d at 1364 ("downstream" regulations addressing ratings "are relevant" to the question of disability). Amicus alleges that *Saunders*'s comment applies only in one direction: that downstream regulations may be "relevant" in order to grant service connection, but not to deny. Am. at 14 n.5. But *Saunders* did not say that, and it is certainly relevant that "[t]here are more than 700 conditions in the rating schedule that are compensable, but the schedule does not include obesity." VAOPGCPREC 1-2017, at ¶ 7; *see id.* at ¶ 8 ("Because obesity is a well-known and widespread condition, if VA had intended to consider obesity as a disease, it would almost certainly have included provisions in its rating schedule related to obesity."); *see also Cook v. Principi*, 318 F.3d 1334, 1339 (Fed. Cir. 2002) (en banc) (citing the "familiar canon of *expressio unius est exclusio alterius*").

Moreover, when it comes to the five "issues" involved in every veteran's case—(1) veteran's status, (2) present disability, (3) service connection, (4) degree

[8] Conversely, review outside of the part 4 "Schedule for Rating Disabilities" may be necessary at the compensation level stage. *See, e.g.*, 38 C.F.R. §§ 3.321-3.324 (General rating considerations; Rating of disabilities aggravated by service; Combined ratings; Multiple noncompensable service-connected disabilities), 3.340 (Total and permanent total ratings and unemployability), 3.343 (Continuance of total disability ratings), 3.350 (Special monthly compensation ratings), and 3.372 (Initial grant following inactivity of tuberculosis).

of disability, and (5) effective date, *Carpenter v. Nicholson*, 452 F.3d 1379, 1384 (Fed. Cir. 2006)—there is no ironclad barrier between each issue. Sometimes questions of service connection dictate veteran status. *See, e.g.*, 38 U.S.C. § 101(24)(C) (injury in the line of duty required to achieve "veteran" status for inactive duty training). Sometimes questions of degree of disability dictate service connection. *See, e.g.*, 38 U.S.C. § 1117(a)(1)(B) (to grant presumptive service connection, disability must be 10 percent disabling within prescribed period).

Because of these interrelationships, that Mr. Larson's claim at this point only involves "service connection"[9] is of no import: a Veterans Court determination that his conditions constitute disabilities under section 1110 would be *indistinguishable* from a determination that VA must assign disability ratings for those conditions via the rating schedule. That is why *Wanner* held that section 7252(b) precludes determinations of "what should be considered a disability." 370 F.3d at 1131.

C. *Wanner*'s Interpretation Of Section 7252(b) Is Not Dicta

Next, Mr. Larson attempts to avoid *Wanner* by arguing that its explicit statement foreclosing his argument, 370 F.3d at 1131 ("direct review of the content of the rating schedule . . . is indistinguishable from the review of 'what should be considered a disability'"), was dicta, i.e., "unnecessary to decide the case." App.

[9] Under *Carpenter*'s formulation, Mr. Larson's case is at the "present disability," not the "service connection," stage. 452 F.3d at 1384.

Br. at 35.

To the contrary, it was fundamental to deciding the case. The appellants in *Wanner* attempted to avoid section 7252(b) by asserting that the bar on judicial review only applied to "the percentages of the disability ratings," not challenges to section 1110 compliance. 370 F.3d at 1129-30. The case could not have been resolved without the Court addressing this argument. And, in direct response, the Court held that the appellants could not evade section 7252(b), because review of section 1110 compliance and "what should be considered a disability" was "indistinguishable" from "direct review of the content of the rating schedule." *Id.* at 1131.

And, even if this statement in *Wanner* were dicta, it still has persuasive value, for the reason addressed above: because of the statutory scheme, review of what constitutes a section 1110 disability is no different from review of what is entitled to a section 1155 disability rating—which directly implicates the content of the rating schedule.[10]

[10] Mr. Larson also argues that the statement in *Wanner* lacks persuasive value because VA policy is not made through nonprecedential board decisions. App. Br. at 38. He is correct that board judges do not make VA policy, but *Wanner* is not premised on any such assumption. Moreover, no policy was made by a board judge here; it is VA's longstanding policy that obesity is not a disease for VA compensation purposes (*Marcelino*, 29 Vet. App. at 157; VAOPGCPREC 1-2017, Holding 1), consistent with the historic understanding of obesity—which has only recently been debated, primarily for purposes of promoting understanding, prevention, and treatment, *id.* at ¶ 5-6. This intentional exclusion of obesity from

D. *Saunders* Reviewed A Veterans Court Legal Interpretation Of Section 1110, Not A VA Choice Regarding Its Schedule

Mr. Larson's third approach to avoid *Wanner* is his argument that "[t]his case is controlled not by . . . *Wanner*, but instead by . . . *Saunders*." App. Br. at 39. He relies on *Saunders* for the proposition that the Veterans Court can review whether a certain condition meets the definition of "disability" under 38 U.S.C. § 1110. *Id.* at 38-41. The flaw in this argument is two-fold.

First, in Mr. Larson's case, the scope of section 7252(b) was the issue before the Veterans Court and is the issue on appeal. *See* Appx8-10; App. Br. at 1. In contrast, in *Saunders*, section 7252(b) was not mentioned in the underlying Veterans Court's decision, briefed by the parties,[11] nor mentioned in the Court's decision. *See* 886 F.3d at 1356-69; Fed. Cir. No. 2017-1466 docket; *Saunders v. McDonald*, Vet. App. No. 15-0975, 2016 U.S. App. Vet. Claims LEXIS 765 (2016). As such, the notion that *Saunders* implicitly cabined the scope of section 7252(b) or overruled *Wanner* without mentioning either authority is utterly unavailing. *Wanner*'s interpretation of section 7252(b) can be overruled by an *en*

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the rating schedule is "the Department's considered judgment." *Id.* at ¶ 8.

[11] To the extent the Government should have invoked section 7252(b) in *Saunders*, its failure to do so (and the resulting opinion in *Saunders*) does not and cannot overrule what this Court held in *Wanner*. The same could be said for *Terry v. Principi*, 340 F.3d 1378, 1380-86 (Fed. Cir. 2003), which predated *Wanner*.

banc opinion, but certainly not a panel opinion that is completely silent on any section 7252(b) issue. *See Moore v. Office of Pers. Mgmt.*, 113 F.3d 216, 218 (Fed. Cir. 1997); Appx10 ("*Saunders* defined 'disability'" generally, but "did not, and could not, change the jurisdictional landscape under which th[e Veterans] Court operates").

Second—and this is the reason why section 7252(b) was not briefed or mentioned in *Saunders*—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. More specifically, in *Sanchez-Benitez v. West*, the Veterans Court had *sua sponte* announced 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." 13 Vet. App. 282, 286 (1999), *aff'd on other grounds sub nom. Sanchez-Benitez v. Principi*, 259 F.3d 1356 (Fed. Cir. 2001). The court had not cited any VA policy, decision, or regulation as support for this legal declaration.[12] Thus, the question in *Saunders* was the validity of *Sanchez-Benitez v. West*'s declaration. 886 F.3d at 1359.

In that context, the *Saunders* Court held that there was no statutory support for *Sanchez-Benitez v. West*'s interpretation of section 1110. *Id.* at 1365-66. The

[12] VA's position in *Sanchez-Benitez* was simply that the evidence of record in that case supported the board's denial of benefits. *Id.* at 285.

Court held that nothing in the statute precluded pain from constituting service-connected disability, *id.*, and emphasized that VA regulations treated pain as a "factor[ ] of disability" and "seriously disabl[ing]," *id.* at 1364 (quoting 38 C.F.R. §§ 4.40, 4.45(f)). But, crucially, the Court's rejection of the Veterans Court's pronouncement that pain *cannot* constitute "disability" as a matter of law was not accompanied by an instruction to VA that pain *must* be considered a "disability" as a matter of law. This is because the *Saunders* Court understood the difference between a *Veterans Court* legal interpretation of section 1110 (which is reviewable de novo) and a *VA* choice regarding "disability" status and the schedule (which is not).

Thus, *Saunders* did not alter the operation of section 7252(b). If anything, the *Saunders* decision confirmed the central tenet of section 7252(b), by holding that the Veterans Court should not be dictating what is or is not a "disability" warranting inclusion or exclusion from the schedule. *See* 38 U.S.C. § 1155 (Secretary shall adopt a schedule for injuries reducing earning capacity, and readjust it from time to time in accordance with experience); *Wanner*, 370 F.3d at 1131 (Secretary's "content selected" for the schedule "is insulated from judicial review"). VA—not the Veterans Court or this Court—is best equipped and statutorily authorized to determine whether a certain condition impairs earning capacity and therefore warrants "disability" status. As noted above, any view that

VA has the discretion to assess the *extent* to which a condition impairs earning capacity (and to construct the schedule accordingly), but not to assess whether a condition affects earning capacity (and thus warrants inclusion in the schedule) in the first instance, cannot be reconciled with 38 U.S.C. §§ 1155, and 7252(b), and *Wanner*.

Glossing over the section 7252(b) issue, Mr. Larson attempts to draw parallels between his case and *Saunders*. App. Br. at 39-41, 44-45. Suffice it to say that those "similar[ities]"—e.g., the fact that Ms. Saunders challenged a statement in *Sanchez-Benitez v. West* as dicta and he is challenging a statement in *Wanner* as dicta, *id.* at 40—are irrelevant. There is a stark difference between an unsupported Veterans Court statement in *Sanchez-Benitez v. West* that this Court had previously described as "perplexing" and had declined to review, *Sanchez-Benitez v. Principi*, 259 F.3d at 1361, and this Court's statement in *Wanner*, which is supported by the statutory scheme.

Moreover, Mr. Larson asserts that obesity is similar to pain because it can "cause a functional impairment by diminishing the body's ability to function." App. Br. at 45 (citing 886 F.3d at 1363-64). But *Saunders* reached that conclusion about pain, in part, in reliance upon VA regulations conceding as much. 886 F.3d at 1364 (quoting 38 C.F.R. §§ 4.40, 4.45(f)). That regulatory acknowledgment is a missing ingredient in the obesity context. *See generally* 38 C.F.R. part 4; *see also*

VAOPGCPREC 1-2017 at ¶ 9-11 ("[I]mpairment is not inevitable or even usual in most persons who meet the . . . criteria for obesity." (citation omitted)). In any event, Mr. Larson does not explain how the possibility of functional impairment due to obesity entitles the Veterans Court to evade section 7252(b)[13] and supplant VA's assessment as to whether obesity warrants "disability" status and recognition in the schedule.

E. Congress Intended To Preclude The Type Of Challenge Mr. Larson Presents Here

Mr. Larson also argues that Congress intended section 7252(b) to constitute a limited preclusion of judicial review. App. Br. at 30 (alleging that Congress barred review of "only *one* aspect of *one* down-stream benefit"). To the contrary, this Court has already reviewed the legislative history of the VJRA and determined that Congress intended a "broad[ ]" preclusion. *Wanner*, 370 F.3d at 1130. The legislative history cited by *Wanner* in support of that conclusion need not be reiterated here.[14]

[13] The same can be said for Amicus's arguments regarding 38 C.F.R. §§ 4.20 and 4.31. Am. at 18-19. These VA regulations have no effect on Congress's section 7252(b) bar.

[14] Amicus notes, as *Wanner* did, that Congress implemented section 7252(b) out of concern that VA's schedule "would be destroyed by piecemeal review of individual rating classifications." Am. at 15 (citing H.R. Rep. 100-963, at 28 (1988)). All the more so if every infirmity, defect, or laboratory test result were subject to litigation regarding inclusion in the schedule.

But there is additional history, post-dating *Wanner*, confirming that Congress intended to preclude the Veterans Court from reviewing the type of challenge Mr. Larson presents here. *See Wingard*, 779 F.3d at 1359 (discussing how Congress rejected a change to section 7252(b) in 2008). In March 2008, Senator Akaka introduced a bill (S. 2737) that would have amended section 7252(b) and permitted the Veterans Court to hear challenges to "the absence of a rating for a condition [allegedly] mandated by statute," and contentions "that a statute passed by Congress to provide compensation for the service-disabled [such as section 1110] is being violated." 154 Cong. Rec. S1819-20 (Mar. 10, 2008). The Senator noted that, under *Wanner*, such challenges were prohibited, and that his proposal would constitute a "limited" exception to *Wanner*. *Id.*

Even that "limited" exception to *Wanner* was too extensive for Congress. Although Senator Akaka's proposal was incorporated into S. 3023, the Senate Committee on Veterans' Affairs dramatically altered it—leaving section 7252(b) untouched and providing for Federal Circuit direct review of VA regulations (including the rating schedule) in 38 U.S.C. § 502. *See* S. Rep. 110-449, at 13-14 (Sep. 9, 2008). The Committee was cognizant of the concern that Senator Akaka's proposal would expose the rating schedule to judicial review in every service connection[15] or increased rating case, and it assured that even the amendment to

[15] That service connection cases were mentioned here corroborates our earlier

section 502 "would be circumscribed by a number of limitations." *Id.* (noting the deferential *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), standard and the 60-day time limit for review). In October 2008, the Committee's alteration was passed into law. Pub. L. 110-389, Tit. I, § 102.

This history confirms that Congress—in 1988[16] and again in 2008—did not intend for the Veterans Court to decide whether obesity, DMS, or any other condition should qualify as a disability under section 1110. In 2008, Congress was willing to pass one exception to the broad preclusion of judicial review announced in *Wanner*: an exception that allows direct Federal Circuit review of newly-promulgated VA regulations or VA petition for rulemaking denials. *See* S. Rep. 110-449, at 13-14. But Congress re-affirmed that the Veterans Court is governed by the *Wanner* standard. *See Gazelle v. Shulkin*, 868 F.3d 1006, 1011 (Fed. Cir. 2017) (Congress legislates against the backdrop of existing law).

F. Mr. Larson's Policy Arguments Are Unavailing

Mr. Larson and Amicus also attempt to support their legal contentions with

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discussion of the interrelationship between service connection determinations and the rating schedule. *See supra* at Argument II.B.

[16] Amicus avers that Congress in 1988 "never intended to strip a veteran's ability to challenge a decision that the veteran's condition was not a service connectible disability." Am. at 16. The verb "strip" is misleading. Prior to 1988, a veteran could not challenge a decision on his benefits claim *at all*. *See* 38 U.S.C. § 211(a) (1985).

policy arguments. First, Mr. Larson asserts that veterans "previously eligible" for certain benefits "have lost access to those benefits" as a result of the Veterans Court's invocation of section 7252(b) in *Marcelino*. App. Br. at 31. There is absolutely no truth to that statement. Section 7252(b) has existed as long as the Veterans Court has, and a faithful application of *Wanner* and section 7252(b) by the Veterans Court does not cause any veteran to "los[e] access" to any "previously eligible" benefit.

Second, Amicus mentions conditions (e.g., tension headaches) not explicitly in the rating schedule that, absent judicial review, "could" be denied "disability" status. Am. at 21, 26. But the cases it cites undermine this concern because they all involve VA *granting* benefits under 38 C.F.R. § 4.20 (Analogous ratings). *Id.* And even if a claim were denied on this basis, judicial review of the board's section 4.20 analysis would still be available (e.g., the board would be required to explain why tension headaches would not be considered "closely related" to "migraine[s]," which are recognized by VA's rating schedule at 38 C.F.R. § 4.124a, Diagnostic Code 8100, *see* 38 U.S.C. § 7104(d)(1)).

Third, Mr. Larson asserts that "many veterans" with obesity "will not qualify for health care treatment through the VA because the agency will not service connect obesity." App. Br. at 43-44. This argument is pure misdirection: the

Veterans Court's jurisdiction, not VA's obesity policy, is at issue here.[17] Moreover, he misconstrues the effect of VA's policy;. For example, VA healthcare is *not* contingent on having a service-connected disability. *See* 38 C.F.R. § 17.36; https://www.va.gov/health-care/eligibility/priority-groups/ (last visited Dec. 15, 2020);[18] *contra* App. Br. at 43-44. And a policy change recognizing obesity as disability would *not* entitle a veteran to outpatient dental care, unless the obesity was totally disabling or associated with a dental condition. *See* 38 U.S.C. § 1712; 38 C.F.R. § 17.161; *contra* App. Br. at 29. Undoubtedly, if VA's disability compensation policy on obesity was "undercut[ting] the Secretary's established priorities" for managing and treating obesity, as Mr. Larson alleges, *id.* at 43, the Secretary would have changed that policy.

But, again, the issue here is the Veterans Court's jurisdiction. And the same entity that established veterans' entitlement to benefits is the entity that limited the

[17] If Mr. Larson disagrees with VA's policy, he has remedies in the executive and legislative branches, as well as the ability to file a petition for VA rulemaking and invoke this Court's review of any petition denial. 38 U.S.C. § 502. But section 7252(b) precludes the avenue he is currently pursuing.

[18] A VA policy change granting noncompensable disability ratings for obesity could (ceteris paribus) potentially take some veterans with obesity from Priority Group 7 or 8 to Priority Group 6. But this appeal involves Mr. Larson, who already has a service-connected disability rated 10% disabling, Appx263, and thus is eligible for Priority Group 3, among the other VA and non-VA benefits discussed at App. Br. at 28-29.

Veterans Court's jurisdiction: Congress. The "right to judicial review" in this realm, Am. at 20-21, is no more and no less than what Congress dictated in chapter 72. Thus, the Veterans Court's faithful application of section 7252(b) does not obstruct any veterans from receiving the benefits to which they are entitled. *Contra* Am. at 25.

G. Mr. Larson's Arguments That Obesity And DMS Should Be Considered Disabilities Are Not Ripe

Mr. Larson also attempts to argue directly to this Court that obesity and DMS should be considered section 1110 disabilities, and that the board erred in determining otherwise. App. Br. at 44-46. In that regard, Mr. Larson alleges that "at least one diagnostic code" in the rating schedule, 38 C.F.R. § 4.119, Diagnostic Code 7907, suggests "that obesity is a functional impairment that affects earning capacity." App. Br. at 45. Similarly, he contends that 38 C.F.R. § 4.20 allows for the provision of an analogous rating "[w]hen an unlisted condition is encountered." *See* App. Br. at 33-34.

These arguments are not ripe. The Veterans Court held that it did not have jurisdiction to address Mr. Larson's argument that obesity and DMS should be considered section 1110 disabilities. Appx10. If the Veterans Court was correct regarding the scope of its jurisdiction, its decision must be affirmed. If the Veterans Court was incorrect, then a remand would be warranted for the Veterans Court and the board to address Mr. Larson's arguments about obesity, DMS,

section 1110, and VAOPGCPREC 1-2017, in the first instance. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (remanding where the ultimate legal question was "heavily based on factual determinations," and emphasizing that an appellate court "should not simply make factual findings on its own" (internal alterations and citation omitted)). This Court should not—without the requisite factfinding below regarding the nature of obesity and DMS—decide in the first instance whether obesity and DMS constitute "disabilities" under section 1110. *Contra* App. Br. at 44-46.[19]

Nevertheless, in an abundance of caution, we do note here three responses to Mr. Larson's arguments about obesity, VA regulations, and section 1110. *First*, although 38 C.F.R. § 4.119 lists "obesity" as one of the five requirements for a 30 percent rating for Cushing's Syndrome, *see* App. Br. at 45, that listing reflects that obesity, in conjunction with certain other manifestations, *signifies* a higher level of Cushing's Syndrome impairment, not that obesity itself impairs earning capacity. *See* VAOPGCPREC 1-2017 at ¶ 7 n.4. This is true of laboratory findings like obesity and DMS: they signify the potential presence of a disease or disability, but

[19] Moreover, if the board grants service connection for Mr. Larson's hypothyroidism and hypogonadism (the two claims the Veterans Court remanded, Appx6-8), that might moot an independent claim for obesity, as weight gain is a symptom of these conditions, *see* Appx29.

do not themselves impair. *See generally* 61 Fed. Reg. at 20,445; *Dorland's* at 1309, 1839.

Second, though 38 C.F.R. § 4.20 allows for an analogous rating "[w]hen an unlisted condition is encountered," *see* App. Br. at 33-34; Am. at 18, this regulation does not require—and has never been interpreted as requiring—VA to service-connect any and all conditions absent from the rating schedule, e.g., hangnails, canker sores, or paresthesia, particularly where that absence is a result of "the Department's considered judgment." VAOPGCPREC 1-2017, at ¶ 8; *see generally Terry*, 340 F.3d at 1386 ("Congress could not have intended to include every defect, infirmity, and disorder within the scope of compensable disabilities."). Section 4.20 helps VA fill gaps between the diagnostic codes of its schedule, but certainly does not hamstring VA's statutory discretion to determine what conditions impair earning capacity and therefore warrant "disability" status. 38 U.S.C. § 1155. The same goes for 38 C.F.R. § 4.31: it permits a "zero percent evaluation" for service-connected disabilities that do not meet the requirements for a compensable evaluation, but in no way compels VA to service-connect every claimed defect, weakness, or infirmity.

Third, although Mr. Larson argues that obesity can cause a functional impairment by diminishing the body's ability to function, App. Br. at 45, obesity is—as noted above—the state of having an excess amount of body fat, as

determined by height or weight. VAOGCPREC 1-2017, at ¶ 2; *Dorland's* at 1309. It is effectively a laboratory test result—not in and of itself a disability. *See* 61 Fed. Reg. at 20,445. Thus, though obesity may signify the presence of, be associated with, or be an intermediate step between a service-connected disease or injury and disability, it is not itself a disease, injury, or disability. VAOGCPREC 1-2017, Holdings 1, 3, and 5.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court affirm the Veterans Court's decision.

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December 18, 2020

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the foregoing brief complies with the Rules of this Court in that it contains 7,437 words including text, footnotes, and headings. This is within the limit of 14,000 words set by Federal Rule of Appellate Procedure (FRAP) Rule 32(a)(7).
2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 18th day of December, 2020, a copy of the foregoing "BRIEF FOR RESPONDENT-APPELLEE" was filed electronically and served on all parties by operation of the Court's electronic filing system.

/s/ Eric J. Singley
ERIC J. SINGLEY