No. 2020-1647

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GARY R. LARSON, JR.,

Petitioner - 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 OF AMICUS CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number No. 2020-1647

Short Case Caption Gary R. Larson, Jr. v. Robert L. Wilkie

Filing Party/Entity National Veterans Legal Services Program and National Organization of Veterans' Advocates, Inc.

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: 08/24/2020

Signature: /s/ Cheryl Zak Lardieri

Name: Cheryl Zak Lardieri

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
National Veterans Legal Services Program		
National Organization of Veterans' Advocates, Inc.		

☐ 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).

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Veterans Legal Services Program (NVLSP) is one of the nation's leading organizations advocating for veterans' rights. It is an independent, nonprofit veterans service organization recognized by the Department of Veterans Affairs (VA) that since 1981 has worked to ensure that the government honors its commitment to our veterans. NVLSP prepares, presents, and prosecutes veterans' benefits claims before the VA, pursues veterans' rights legislation, and advocates before this Court and other courts. NVLSP has secured more than $5.2 billion in VA benefits for veterans and their families.

The issues in this appeal lie at the core of NVLSP's experience and expertise. NVLSP has extensive experience representing veterans before the U.S. Court of Appeals for Veterans Claims (Veterans Court) and is intimately familiar with the law governing that court's jurisdiction to review denials of service connection. NVLSP also has a strong interest in the pro-claimant policy adopted by Congress and in challenging decisions, such as the decision on appeal, that undermine this policy.

The National Organization of Veterans' Advocates, Inc., (NOVA) is a not-for-profit educational membership organization. Founded in 1993, it is comprised of nearly 650 individual members actively engaged in representing our nation's military veterans, their families, and their survivors before the VA and federal

courts. NOVA's bylaws include as its "purpose" the development of veterans' law and procedure through research, discussion, and participation as an amicus before this Court. NOVA seeks to develop high standards of service and representation for all persons seeking veterans' benefits.[1]

SUMMARY OF ARGUMENT

The Veterans Court, citing 38 U.S.C. § 7252(b), held that it lacked jurisdiction to review the Board of Veterans' Appeals (board) decision denying appellant Gary Larson's entitlement to service connection on grounds that his claimed conditions (obesity and dysmetabolic syndrome) were not listed on the ratings schedule. Under the Veterans Court's sweeping jurisdictional holding, the Veterans Court is unable to review any board denial of service connection of any condition not listed in the VA's ratings schedule. The Veterans Court's rule is wrong for three reasons. First, it is contrary to the plain language of section 7252(b) and this Court's precedent interpreting that provision. Second, it erroneously conflates the issue of service connection with the issue of compensation, thereby erroneously precluding judicial review for disabilities as to which the ratings schedule is silent. Service connection

[1] Appellant and appellee have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund the preparation or submission of this brief.

is not dependent upon ratability; service connection and ratability are two distinct legal determinations. Third, if left to stand, the Veterans Court's ruling would prejudice veterans by denying them meaningful appellate relief regarding unlisted conditions and preclude them from obtaining valuable ancillary benefits.

Accordingly, this Court should reverse the judgment below and remand for further proceedings.

ARGUMENT

I. The Veterans Court's Holding Erroneously Restricts the Court's Power to Review Board Decisions Denying Service Connection.

In this case, the board denied Mr. Larson service connection for obesity and dysmetabolic syndrome on grounds that neither condition is ratable under the VA's ratings schedule. Appx23. According to the board, obesity is "not a condition for which service connection can be granted" because "the ratings schedule does not contemplate a separate disability rating for obesity and there exists no statutory or legal guidance to allow for such consideration." *Id*.; Appx8-9. Similarly, the board ruled 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." Appx9; Appx25.

On appeal, the Veterans Court declined to exercise jurisdiction over the board's findings as to service connection because it "lacks jurisdiction to determine

what conditions are or should be disabilities for VA compensation purposes," relying upon 38 U.S.C. § 7252(b) and the Veterans Court's decision in *Marcelino v. Shulkin*, 29 Vet. App. 155, 158 (2018). Appx10. The Veterans Court held that, because it lacked jurisdiction, it need not consider Mr. Larson's arguments as to the proper legal standard to determine whether his conditions are disabilities. *Id*.

As explained below, the Veterans Court's jurisdictional holding is contrary to settled law and should be reversed.

A. The Veterans Court's Jurisdictional Holding Is Contrary to the Plain Language of 38 U.S.C. § 7252 and This Court's Precedent.

Under 38 U.S.C. § 7261, the Veterans Court is required to decide all relevant questions of law; interpret constitutional, statutory, and regulatory provisions; and determine the meaning or applicability of the terms of an action of the Secretary. 38 U.S.C. § 7261(a)(1). The Veterans Court shall "hold unlawful and set aside" decisions, findings, conclusions, rules, and regulations "issued or adopted" by the board that are found to be, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 7261(a)(3)(A). Section 7252(b) imposes a narrow limitation on the Veterans Court's jurisdiction, however:

> 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.

38 U.S.C. § 7252(b). The referenced section 1155 requires that the Secretary adopt a schedule for rating conditions based on the average impairment of earning capacity that veterans experience because of those conditions. That ratings schedule is codified in 38 C.F.R., part 4. The plain language of section 7252(b) thus precludes the Veterans Court from reviewing a challenge to the "schedule of ratings" or any "action of the Secretary" in adopting or revising the ratings schedule. But, contrary to the decisions of the board and the Veterans Court below and in *Marcelino,* section 7252(b) does not preclude the Veterans Court from reviewing the board's denial of service connection for conditions that lack "ratable" symptoms. Appx8-9.

As this Court has explained, section 7252(b) "only prohibits review of the substance of the Secretary's action with respect to the schedule of ratings." *Fugere v. Derwinski*, 972 F.2d 331, 335 (Fed. Cir. 1992). For example, in *Wanner v. Principi*, 370 F.3d 1124 (Fed. Cir. 2004) the veteran argued that Diagnostic Code (DC) 6260 for tinnitus was invalid under 38 U.S.C. § 1110 and the Equal Protection Clause, contending that DC 6260's content was unlawful in requiring that the veteran's tinnitus be caused by a "head injury, concussion, or acoustic trauma" in order to be compensable. *Id.* at 1126. This Court held that the Veterans Court lacked jurisdiction to reach Mr. Wanner's statutory argument, explaining that the jurisdictional scheme "consistently excludes from judicial review all content of the ratings schedule as well as the Secretary's actions in adopting or revising that

content." *Id.* at 1129-30.[2] Because Mr. Wanner's argument challenged the content of the ratings schedule, the Veterans Court did not possess jurisdiction over his appeal. *Id.* at 1131.

Wingard v. McDonald, 779 F.3d 1354 (Fed. Cir. 2015), involved similar circumstances. In that case, the VA found that a deceased veteran had a service connected disability but assigned him a non-compensable (0%) disability rating under the ratings schedule. *Id.* at 1355. The veteran's daughter argued that, by adopting a 0% rating, the ratings schedule substantively violated statutory constraints in section 1155. *Id.* at 1356-57. Specifically, the daughter argued that the 0% rating was contrary to 38 U.S.C. § 1155's requirement that the Secretary "establish a schedule 'provid[ing] ten grades of disability and no more' in 10 percent increments from 10 to 100" and section 1110's statement that "'the United States will pay to any veteran thus disabled . . . compensation as provided in this subchapter.'" *Id.* at 1356. In other words, Ms. Wingard argued that the ratings schedule may not include a 0% rating, hence directly challenging the content of the schedule. The Veterans Court reached this argument, notwithstanding section 7252(b). *Id.* at 1356. This Court reversed, explaining that, as in *Wanner*, the "core issue was 'whether [a] regulation complies with the statutory authority under which

[2] This Court recognized that the Veterans Court may hear constitutional challenges to the ratings schedule. *Wanner*, 370 F.3d at 1130-31.

disability compensation is paid.'" *Id*. at 1357 (quoting *Wanner*, 370 F.3d at 1127). Because Ms. Wingard's argument was "a substantive challenge to the schedule as conflicting with the statute," the Veterans Court lacked jurisdiction. *Id.*

Wanner and *Wingard* both dealt with substantive challenges to the content of the ratings schedule, which were beyond the Veterans Court's jurisdiction under section 7252(b). But neither case addressed a situation in which there is no dispute about whether a "regulation complies with the statutory authority" for disability compensation. *Id*. This Court has never held that the Veterans Court lacks jurisdiction to review appeals in which a veteran seeks service connection for a disability that is not listed in the ratings schedule or that lacks "ratable" symptoms. Appx5-6. Under those circumstances, the Veterans Court "shall," consistent with its broad jurisdictional authority granted in section 7252(a) and the broad scope of review required in section 7261, review a board decision as to whether a condition constitutes a "disability" within the meaning of section 1110, which is a question of law, and thus may be service connected.[3]

[3] In *Byrd v. Nicholson*, 19 Vet. App. 388, 391-92 (2005), the Veterans Court held that it lacked jurisdiction under section 7252(b) to review a denial of service connection under a regulation outside the ratings schedule, 38 C.F.R. § 3.381(a), that contained language subjecting it to a regulation within the ratings schedule, 38 C.F.R. § 4.150, that explicitly stated that certain effects of periodontal disease were not disabling. *Byrd* is unsound because section 1155 does not empower the Secretary to, in the ratings schedule, deem a condition to be not disabling. In any event, *Byrd* is distinguishable because its concerns are absent where the ratings schedule is silent.

Contrary to the Veterans Court's understanding, neither *Wingard* nor *Wanner* stands for a different proposition. The decision below relied on *Marcelino*'s statement that *Wanner* "held that 'direct review of the content of the ratings schedule is 'indistinguishable' from review of what should be considered a 'disability.'" Appx9 (citing *Marcelino v. Shulkin*, 29 Vet. App. 155, 158 (2018), quoting *Wanner*, 370 F.3d at 1131). But *Marcelino* misstates *Wanner*'s holding and takes the quoted language out of context. The full passage states:

> The 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.

370 F.3d at 1131 (emphasis added). As the surrounding context and italicized text demonstrate, this passage is merely a reference to what the Veterans Court did in *that case* ("here"). The Veterans Court in *Wanner* erred because it reached the merits of Wanner's contention that DC 6260 was unlawful, which necessarily involved a determination as to whether the ratings schedule could include head injury, concussion, and trauma as a prerequisite to a 10% disability rating. *Id.* at 1126-27. Thus, the issue on appeal took direct issue with the content of the ratings schedule.

Here, unlike in *Wanner*, there is no challenge to the content of the ratings schedule. Thus, *Wanner* is not controlling, and in fact it demonstrates that *Marcelino* and its progeny, including the decision below, were wrongly decided.

B. The Veterans Court's Jurisdictional Holding Erroneously Precludes Judicial Review of Denials of Service Connection for Disabilities That Are Not in the Ratings Schedule.

Contrary to the Veterans Court's jurisdictional holding, as explained below, under the statutory and regulatory scheme, service connection and ratability are two distinct inquiries, and a disability for purposes of 38 U.S.C. § 1110 does not need to be listed on the ratings schedule to be service connected.

1. The Board Cannot Insulate Its Decisions from Judicial Review by Implicating the Ratings Schedule When the Ratings Schedule Does Not Determine Service Connection.

Mr. Larson sought service connection determinations for obesity and dysmetabolic syndrome. To establish service connection, a veteran must prove three things, and only three things: (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. *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009); *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); 38 C.F.R. § 3.303(a).

In this case, the board denied Mr. Larson service connection for obesity and dysmetabolic syndrome, holding on page 4 of its decision that "[t]he criteria for service connection . . . have not been met." Appx20. That ruling, however, was not based on Mr. Larson's failure to satisfy one of the three criteria necessary for entitlement to service connection. Had it been, there would be no dispute regarding

the Veterans Court's jurisdiction to review the denial—such rulings denying service connection are routinely appealed and reviewed. What makes this decision different is that the board based its denial of service connection on a requirement that does not exist, that is, that the disability be listed on the ratings schedule or be ratable. Specifically, the board held that "the ratings schedule does not contemplate a separate disability rating for obesity" and "[i]n the absence of any ratable symptoms . . . service connection for the condition is not warranted." Appx24. Similarly, the board ruled that Mr. Larson's "metabolic syndrome does not satisfy the requirement of a current disability because it is not manifested by anything that would be ratable under the VA's rating schedule." Appx25. But that is not the law. Service connection is not dependent upon ratability; service connection and ratability are two entirely different things.

The board's legal error of basing its denial of service connection on ratability and the fact that Mr. Larson's conditions were not listed on the ratings schedule permitted the Secretary to improperly use that legal error to advance the incorrect argument (and the Veterans Court to erroneously hold) that the issue on appeal had to do with the content of the ratings schedule (which is not reviewable) rather than whether Mr. Larson had a service connectible disability (which is reviewable). The board's failure to correctly apply the law cannot be the basis for stripping Mr. Larson of his right to judicial review. Stated differently, the law cannot be that a veteran

loses the right to challenge the board's decision whenever the board erroneously relies on the ratings schedule in its decision even though, if the law were applied correctly, the ratings schedule would have nothing to do with the analysis. To so hold would not only leave unchecked egregious legal errors but would also encourage the Secretary to implicate the ratings schedule to escape review.

The Veterans Court is required to "hold unlawful and set aside" decisions issued by the board that are "not in accordance with law." 38 U.S.C. § 7261(a)(3)(A); *see, e.g.*, *Tucker v. West*, 11 Vet. App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"). The law does not permit the board to sidestep judicial review by misapplying the law. The issue on appeal to the Veterans Court was not whether obesity and dysmetabolic syndrome should be on the ratings schedule. The issue was whether Mr. Larson's obesity and dysmetabolic syndrome have caused him functional impairment such that those conditions can constitute service connectible disabilities. To reiterate, whether obesity or dysmetabolic syndrome are on the ratings schedule for *compensation* purposes is beside the point. A disability's rating evaluation for compensation purposes is a "downstream" determination, not reached until after the prerequisite of service connection has been met. *Grantham v. Brown*, 114 F.3d 1156, 1158 (Fed. Cir. 1997) (noting that the court

"never reache[s] the down-stream question concerning compensation" until service connection is determined); *Breland v. Wilkie*, No. 18-5980, 2020 WL 2781851, at *4 (Vet. App. May 29, 2020) ("When a condition is not service connected, VA never reaches the downstream question of compensation.").

In *Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018), this Court exercised its jurisdiction in determining whether pain alone could constitute disability. There is no reason why jurisdiction would exist in *Saunders*, but not here. The issues in the two cases are, at the pertinent conceptual level, the same: what constitutes a service connectible disability? In *Saunders* the issue was whether Saunders's pain was a service connectible disability, and here the issue is whether Mr. Larson's obesity and dysmetabolic syndrome are service connectible disabilities. Just as the content of the ratings schedule was not at issue in *Saunders*, it likewise is not at issue here.

2. The Law Is Clear That Whether a Veteran Has a Service-Connectible Disability Hinges on Functional Impairment, Not Ratability.

The fundamental error in the Veterans Court's jurisdictional ruling is that it lumps together service connection and compensation. The statutory scheme and court precedent make clear that those are two separate and distinct legal concepts. Whether a veteran is entitled to disability compensation requires a two-step analysis. The first step is to determine if a service connectible disability exists. The second step is to determine whether the veteran is entitled to compensation, which is based

on the degree of impairment in earning capacity resulting from the service connectible disability. Step one is necessarily a precursor to step two, such that the determination of service connection is a qualifier for determining ratability; ratability does not determine service connection. *See Grantham*, 114 F.3d at 1158-59 (explaining the two steps as the "up-stream element of service-connectedness" and the "down-stream element of compensation"); *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affairs*, 927 F.3d 1263, 1264 (Fed. Cir. 2019) ("*Once the VA has determined the existence of a disability*, the VA must rate the disability, that is, determine the degree to which the veteran's earning capacity has been diminished.") (emphasis added); *Breland*, 2020 WL 2781851, at *4 (service connection is determined first and then "the downstream question of compensation" is decided). To hold otherwise puts the proverbial cart before the horse.[4]

With respect to step one, no statute or regulation expressly defines what constitutes a disability. *See Saunders*, 886 F.3d at 1362 (noting that 38 U.S.C. § 1110 "does not expressly define what constitutes a 'disability'"). But "'[i]n the absence of an express definition,' the presumption is that 'Congress intended to give [statutory] words their ordinary meanings.'" *Id*. (citations omitted). Employing the dictionary definition of disability, *Saunders* held that disability means a functional impairment

[4] It also can strip the veteran of tangible benefits, such as entitlement to VA health care and preference in federal and state employment (discussed in detail below).

and that impairment means "any abnormality of, partial or complete loss of, or loss of the function of, a body part, organ, or system." *Id*. at 1364. *Saunders* then concluded that pain could be a service connectible disability because "[n]one of these definitions preclude finding that pain may functionally impair a veteran." *Id*.

Saunders is relevant for two reasons: it demonstrates that the Veterans Court erred here in holding that it lacked jurisdiction to determine what constitutes a service connectible disability, and it highlights the two-step analysis that the VA must apply when determining benefits. There is the initial service connection determination, and then there is the downstream rating determination. *Id*. at 1364 (noting that even "the Secretary argues that the assignment of ratings is downstream from the initial determination that a veteran has a disability"); *Grantham*, 114 F.3d at 1158 (noting that the court "never reache[s] the down-stream question concerning compensation" and ratability until service connection is determined); *Breland*, 2020 WL 2781851, at *4 (same).[5]

[5] As this Court noted in *Saunders*, the VA's regulations assigning ratings for pain "indicate how the VA interprets the role of pain in assessing disability, and thus they are relevant to the question of whether pain can be a disability." 886 F.3d at 1364 (emphasis added). *Saunders* notes that the existence of a rating may be "relevant" to assessing a disability. *Id.* That is so because the regulations essentially can act as a concession for *granting* service connection, acknowledging the functional impairment and its nature. *See id.* But absence of a condition being listed in the ratings schedule is not a valid ground on which to *deny* service connection.

In this case, the board deprived Mr. Larson of step one. And because of the Veterans Court's refusal to review that decision, not only does Mr. Larson lack any recourse to address the error, but similarly situated veterans going forward also can expect to be deprived of the basic right to judicial review, which goes against the very purpose of the Veterans' Judicial Review Act (VJRA) and the care that Congress took narrowly to circumscribe section 7252(b)'s jurisdictional bar of *ratings schedule* challenges.

The VJRA's legislative history reflects that the intent of the statute was to provide veterans "the right to judicial review of the final decisions by the Administrator denying their benefit claims." 131 Cong. Rec. 21287, 21401 (July 30, 1985). Section 7252(b)'s limitation on judicial review of ratings schedule challenges was meant to address a very specific issue. Congress noted that "[s]ome apprehension has been expressed that the VA schedule for rating disabilities issued pursuant to [statute] *would be destroyed by piecemeal review of individual rating classifications.*" H.R. Rep. 100-963, at 28 (1988) (emphasis added). It is in that context that the jurisdictional limitation must be analyzed. Congress was concerned, for example, that the Secretary would require in the ratings schedule that a veteran must have a 20-degree reduction in range of motion in order to receive a certain disability rating and that the courts would find that the veteran was required to have only a 10-degree reduction or that no reduction at all was required. Section 7252(b)

was intended to avoid that scenario and prohibit the courts from second guessing the content of the ratings schedule. Congress never intended to strip a veteran's ability to challenge a decision that the veteran's condition was not a service connectible disability.

a. Entitlement to Service Connection Is Determined by Evidence Such as the Veteran's Military and Medical Records and Lay Testimony, Not by Looking to the Ratings Schedule.

Nowhere in any statute or regulation does it say that a veteran demonstrates service connection by establishing that the veteran's condition is listed in the ratings schedule. Rather, the regulations provide that service connection is shown by evidence such as a veteran's service and medical records and lay evidence and that "[d]eterminations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law *under a broad and liberal interpretation* consistent with the facts in each individual case." 38 C.F.R. 3.303(a) (emphasis added). Indeed, the narrow interpretation adopted by the Veterans Court is directly contrary to the pro-veteran purpose of the statutory and regulatory scheme. *See, e.g.*, *Henderson v. Shinseki*, 562 U.S. 428, 440–41 (2011); *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004); *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998).

b. Statutory Construction Principles Demonstrate That a Determination of Disability Cannot Be Limited to the Conditions Listed in the Ratings Schedule.

The canons of statutory construction apply equally to regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019) ("a court must apply all traditional methods of interpretation to any rule"). Regulations, like statutes, "should not be read as a series of unrelated and isolated provisions." *Saunders*, 886 F.3d at 1365. The provisions must be read "in their context and with a view to their place in the overall . . . scheme." *Id*. (citations omitted). Moreover, regulations should not be read in such a way that would render their existence superfluous, meaningless, or moot. *Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (courts should not interpret "a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous").

In *Saunders*, this Court explained that when Congress wished to define disability "as equivalent to an injury or disease, it [did] so explicitly" and that the absence of an express equation of disability with injury or disease for service connection purposes was evidence that Congress did not intend that meaning. 886 F.3d at 1363. The same rationale applies here. If Congress or the VA had intended to equate disability with a condition on the ratings schedule, they could have expressly done so; they did not. For example, 38 U.S.C. § 1110 could have stated "For a condition listed on the ratings schedule resulting from personal injury suffered

or disease contracted in the line of duty . . . the United States will pay any veteran[.]" But Congress did not limit service connectible disabilities in that way. Instead, Congress simply stated "For *disability* resulting from . . . ." 38 U.S.C. § 1110 (emphasis added). When that statute is read in conjunction with the regulations, as this Court is required to do, it is evident that a disability for purposes of section 1110 is not limited to conditions specifically listed in the ratings schedule.

For example, 38 C.F.R. § 4.20, which authorizes ratings by analogy, permits compensation for conditions that are not listed in the ratings schedule but are analogous to conditions that are listed:

> When an unlisted condition is encountered it will be permissible to rate under a closely related disease or injury in which not only the functions affected, but the anatomical localization and symptomatology are closely analogous.

The very existence of section 4.20 establishes that a disability need not be listed in the ratings schedule to be eligible for service connected status. Otherwise, ratings by analogy would not be permitted, and section 4.20 would serve no purpose.[6]

[6] In its brief before the Veterans Court below, the Secretary did not dispute that the Veterans Court has jurisdiction to review the board's decisions related to analogous ratings. *See, e.g.*, *Clay v. Wilkie*, No. 19-2569, 2020 WL 3864476, at *1 (Vet. App. July 9, 2020) ("tension headaches"); *Lendenmann v. Principi*, 3 Vet. App. 345, 350 (1992) ("ischemic injury to the cerebellum manifested by balance problems"); *Aronson v. McDonald*, No. 13-2212, 2015 WL 4486513 (Vet. App. July 23, 2015) ("Crohn's disease"); *Brown v. West*, 17 Vet. App. 357 (2000) ("neurodermatitis"); *Green v. West*, 11 Vet. App. 472, 475 (1998) ("lymphadenopathy"); A*llbritton v. Principi*, 18 Vet. App. 160 (2002) ("strongyloidiasis"). The presence of judicial review of analogous ratings—which necessarily involves conditions not listed on the (continued…)

The regulation at 38 C.F.R. § 3.303(c) also demonstrates that service connection is not dependent upon the condition being listed in the ratings schedule. In section 3.303(c), the VA has identified specific conditions that it deems ineligible for service connection. *Id*. (listing congenital or developmental defects, refractive error of the eye, personality disorders, and mental deficiency as ineligible for disability compensation). If, as the board held, a condition must be listed in the ratings schedule to be service connectible, then there would have been no reason for the VA to identify conditions it deems ineligible; it would be sufficient that the conditions were simply left off the schedule. The list of exclusions in section 3.303(c) is thus another VA acknowledgment that service connection is not limited to conditions expressly listed in the ratings schedule.

Moreover, 38 C.F.R. § 4.31 provides that "a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met." Thus, ratability is not required for service connection. If a service connected disability does not meet the requirements for compensation, then the veteran is assigned a zero percent disability rating. It does not mean that the veteran is determined not to have a service connected disability.

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ratings schedule—emphasizes that there is simply no reason to foreclose judicial review of conditions not listed on the ratings schedule where the court has not taken the next required analytical step of reviewing whether the unlisted condition is "closely analogous" to a listed condition.

Thus, the regulations contemplate and make clear that service connection and compensation are two entirely different things and that the ratings schedule is relevant to compensation. The "rating schedule is *primarily a guide* in the *evaluation of disability* resulting from all types of diseases and injuries encountered as a result of or incident to military service." 38 C.F.R. § 4.1 (emphasis added). Thus, the disability is already deemed to have existed prior to the "evaluation" of it under the ratings schedule.

II. The Veterans Court's Jurisdictional Holding Will Adversely Affect Veterans.

The Veterans Court's erroneous and broad interpretation of section 7252(b) will adversely affect veterans in three meaningful ways: (1) as discussed above, in contravention of the plain language of the statute and the legislative intent, it will deprive veterans of judicial review of certain service connection determinations involving disabilities that are not listed in the ratings schedule, (2) it will deprive veterans of valuable ancillary benefits, and (3) it will lead to inconsistent rulings and treatment of veterans.

A. The Veterans Court's Jurisdictional Holding Will Prevent Veterans From Obtaining Judicial Review.

Under the Veterans Court's ruling, veterans seeking service connection for disabilities that are not listed in the ratings schedule will be deprived of their right

to judicial review before the Veterans Court, which goes against the purpose of sections 7261 and 7252.

To the extent that the Veterans Court's ruling is read to preclude appellate review of denials of service connection based on ratings by analogy, the following conditions would be unreviewable before the Veterans Court simply because they are not listed in the ratings schedule: Crohn's disease,[7] ischemic injury to the cerebellum,[8] gynecomastia,[9] chronic diarrhea,[10] neurodermatitis,[11] and strongyloidiasis.[12] And these are just among conditions for which the Veterans Court has exercised jurisdiction in the analogous-rating context.

B. The Jurisdictional Holding Will Deprive Veterans of Valuable Ancillary Benefits.

The VJRA's purpose was "to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled under law." 133 Cong. Rec. S201-01 (daily ed. Jan. 6, 1987) (statement of Sen. Alan Cranston). The Veterans

[7] *Aronson v. McDonald*, 2015 WL 4486513, at *2 - 4.
[8] *Lendenmann v. Principi*, 3 Vet. App. at 350.
[9] *Hauser v. Peake*, No. 06-3004, 2008 WL 2814690, at *1 (Vet. App. June 30, 2008).
[10] *Ivey v. West*, 17 Vet. App. 244 (1999).
[11] *Brown*, 17 Vet. App. 357.
[12] *Allbritton*, 18 Vet. App. 160.

(continued…)

Court's broad, erroneous jurisdictional holding in *Marcelino* and its progeny[13] has deprived, and as repeated here will deprive, veterans of valuable benefits because it unlawfully precludes veterans from obtaining judicial review of denial of service connection, which can deliver valuable benefits even if compensation is unavailable.

A veteran who can establish service connection is entitled to a host of benefits even if he obtains a 0% disability rating, including:

(1) a 10-point veteran preference in federal hiring;
(2) priority-level access to VA health care;
(3) no-cost health care and prescription drug benefits;
(4) travel allowances for health care appointments;
(5) service-disabled veterans' insurance;
(6) use of commissaries, exchanges, and morale, welfare and recreation (MWR) retail facilities, in-person and online;
(7) waiver of VA funding fee for VA home loans (for veterans with multiple 0% disability ratings); and
(8) burial and plot allowance (for veterans with multiple 0% disability ratings).

See, e.g., 5 U.S.C. §§ 3309 & 2108 (a "disabled veteran," which the statute defines as including a veteran that "has established the present existence of a service-connected disability," is entitled to a 10-point veteran preference in federal hiring); 38 U.S.C. § 1710(a)(1)(A) ("The Secretary . . . shall furnish hospital care and

[13] *See, e.g.*, *Martinez-Bodon v. Wilkie*, --- Vet. App. --- , 2020 WL 4590176 (Aug. 11, 2020) (relying on *Marcelino* to deny jurisdiction).

medical services which the Secretary determines to be needed . . . to any veteran for a service-connected disability"); 38 C.F.R. § 17.36 (providing that a veteran with a non-compensable service connection may receive level 7 priority for enrollment in the VA health care system); 38 U.S.C. § 1712(a)(1)(B) (providing, under certain conditions, that "outpatient dental services and treatment, and related dental appliances, shall be furnished under this section only for a dental condition or disability . . . which is service connected, but not compensable in degree"); 38 C.F.R. § 17.37 ("Even if not enrolled in the VA healthcare system: . . . a veteran who has a service-connected disability will receive VA care for [hospital, outpatient, and extended care services]. . . for that service-connected disability"); *Alleman v. Principi*, 349 F.3d 1368 (Fed. Cir. 2003) ("Service Disabled Veterans' Insurance (SDVI) statute [38 U.S.C. § 1922(a)] requires actual determination by the Department of Veteran's Affairs (DVA) that veteran's death or disability is service connected as prerequisite to eligibility for SDVI benefits; statute refers to date service connection is determined, and legislative history shows Congress's intention to limit right to apply for SDVI benefits to those with service-connected disability"); *Federal Benefits for Veterans, Dependents, and Survivors*, at 42, U.S. DEP'T OF VA (2019 ed.) ("Veterans . . . who have VA rated service-connected disabilities, *even disabilities that are 0-percent disabling*, but are otherwise in good health, may apply to VA for up to $10,000 in life insurance coverage under the S-DVI program.")

(emphasis added); *Service Connected Matrix*, U.S. DEP'T OF VA, https://benefits.va.gov/benefits/derivative_sc.asp (last visited Aug. 21, 2020) (explaining that a veteran with a "[n]on-compensable 0 percent disability rating" qualifies for "[n]o cost health care and prescription drugs for service connected disabilities (if no income limits are met)[,] [t]ravel allowances for scheduled appointments to care at a VA medical facility or VA authorized health care facility[, and] [u]se of commissaries, exchanges, and morale, welfare and recreation (MWR) retail facilities, in-person and online").

Veterans with service connected disabilities also may receive certain state benefits. *See, e.g.*, Va. Code Ann. § 40.1-27.2, 2.2-2903 (2020) (permitting an employer to grant preference in hiring to a veteran, which is defined to include a person who received an honorable discharge, provided that such person has more than 180 consecutive days of active duty or has a service connected disability); *Florida Veterans' Benefits Guide*, at 1, FL. DEP'T OF VA (2020) (noting state legislation signed into law in 2020).

Moreover, a veteran with multiple non-compensable ratings for various conditions also may receive a 10% rating under certain circumstances if the veteran can show that the various disabilities have affected the veteran's ability to work. 38 C.F.R. § 3.324 ("Whenever a veteran is suffering from two or more separate permanent service-connected disabilities of such character as clearly to interfere

with normal employability, even though none of the disabilities may be of compensable degree . . . the rating agency is authorized to apply a 10-percent rating, but not in combination with any other rating.").

Thus, even if a veteran's condition receives a 0% disability rating, the veteran is nonetheless entitled to the "upstream" determination that the veteran's disability is service connected so that he can obtain benefits such as those listed above. If the board denies service connection to a veteran on the grounds that the veteran's condition is not "ratable," the law safeguards these rights by entitling the veteran to seek review before the Veterans Court and, in that manner, continue to seek the predicate determination entitling the veteran to valuable ancillary benefits. By denying veterans the right to appeal to the Veterans Court under such circumstances and tying service connection to ratability, the Veterans Court's holding will strip large numbers of veterans of valuable benefits that they are entitled to receive, contrary to the very purpose of the VJRA.[14]

There can be no dispute that a determination of service connection, regardless of ratability, is significant and conveys valuable benefits to the veteran. For that

[14] The purpose of the VJRA was to "ensure that veterans and other claimants before the VA receive all benefits to which they are entitled under law." 133 Cong. Rec. S201-01.

reason alone, the Veterans Court's jurisdictional holding, premised upon the erroneous conflation of service connection and ratability, cannot stand.

C. The Jurisdictional Holding Will Lead to Inconsistent Results Among Similarly Situated Veterans.

Taken to its natural conclusion, the Veterans Court's decision means that any time a condition is not listed on the ratings schedule, the board could simply and summarily deny service connection without any analysis, and the veteran would have no recourse. As a result, inconsistent decisions would necessarily follow with similarly situated veterans being treated differently. For example, in cases involving two veterans seeking disability for tension headaches, one veteran could receive service connection, as was the case in *Hayes v. McDonald*, No. 15-1309, 2016 WL 1275216 (Vet. App. Apr. 1, 2016), and another could be summarily denied service connection with no ability to challenge either the denial of service connection or the board's failure to provide adequate reasons or bases for denying compensation under an analogous rating.

This Court should not permit an interpretation of section 7252 that would result in disparate treatment among veterans. That is exactly what the jurisdictional holding in this case would do.

CONCLUSION

For these reasons, we respectfully request that this Court reverse the judgment below, overturn *Marcelino* and its progeny as wrongly decided, and remand to the Veterans Court for further proceedings.

Dated: August 24, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all counsel of record on August 24, 2020 by electronic means. This filing was served electronically to all parties by operation of the Court's electronic filing system.

Dated: August 24, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Federal Circuit Rule 32(a). The brief contains 6252 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using MS Word in a 14-point Times New Roman font.

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