

No. 11-603

In the Supreme Court of the United States

KEITH A. ROBERTS, PETITIONER

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Veterans Affairs properly severed petitioner's service-connected disability benefits for fraud.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 647 F.3d 1334. The opinion of the en banc Court of Appeals for Veterans Claims (Pet. App. 25a-100a) is reported at 23 Vet. App. 416. The opinion of the Board of Veterans' Appeals (Pet. App. 101a-154a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2011. A petition for rehearing was denied on August 16, 2011 (Pet. App. 155a-156a). The petition for a writ of certiorari was filed on November 14, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Department of Veterans Affairs (VA) severed petitioner's service-connected disability benefits for fraud. The Board of Veterans Appeals (Board) upheld the severance determination, Pet. App. 101a-154a, and the Court of Appeals for Veterans Claims (Veterans Court) affirmed in relevant part. *Id.* at 25a-100a. The court of appeals affirmed. *Id.* at 1a-22a.

1. In general, the VA provides compensation to veterans “[f]or disability resulting from personal injury suffered or disease contracted in line of duty.” 38 U.S.C. 1110; see also 38 U.S.C. 1131. A veteran's disability is “service-connected,” and therefore eligible for compensation by the VA, if “such disability was incurred or aggravated * * * in line of duty in the active military, naval, or air service.” 38 U.S.C. 101(16). After the VA's determination that a veteran's disability was service-connected has been in force for ten years, the veteran's right to receive benefits “shall not be severed” except, *inter alia*, “upon a showing that the original grant of service connection was based on fraud.” 38 U.S.C. 1159.

The VA has promulgated rules for determining when a veteran's disability will qualify as service-connected. See 38 U.S.C. 501(a)(1) (authority of the Secretary to prescribe rules for benefits determinations). In general, each medical condition “for which [a veteran] seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence.” 38 C.F.R. 3.303(a). To establish a service connection for post-traumatic stress disorder (PTSD), the VA requires a diagnosis of the disorder; medical evidence linking the

veteran's symptoms with an "in-service stressor," such as combat experience; and "credible supporting evidence that the claimed in-service stressor occurred." 38 C.F.R. 3.304(f).

2. Petitioner served on active duty in the United States Navy from 1968 through 1971. Pet. App. 4a. For most of that time, he was stationed at a Naval Air Facility in Naples, Italy. *Ibid.*

During a 1991 psychiatric examination at a VA medical center, petitioner described witnessing the accidental death of a friend, Gary Holland, while they were stationed together in Naples. Pet. App. 4a. According to the 1991 examination report, petitioner told the examiner that part of an airplane in a hangar had fallen upon and crushed Holland, and that petitioner had been "arrested for damaging the plane while trying to extricate his friend." *Ibid.* (quoting report). The examiner noted that "nothing appears in [petitioner's] service records about this incident." *Ibid.* Petitioner also told the examiner that, in a separate incident in December 1969, he had been arrested and placed in a straight jacket and restraints by Navy shore patrol. *Ibid.* The examiner diagnosed petitioner with dysthymia and mixed personality disorder. *Ibid.*

After filing an initial disability claim with VA in 1993, petitioner amended his claim in 1994 to request service-connected disability benefits for PTSD. Pet. App. 4a-5a. In support of that claim, he submitted a letter to the VA regional office in which he cited as the in-service stressor for his condition the 1969 death of his "very good friend" Holland. *Id.* at 5a. The letter described in detail the accident that had caused Holland's death, including petitioner's prominent role in the rescue efforts, his arrest at the direction of a safety officer who decreed that

it was “more important to save the plane than it was to save the man,” and petitioner’s firm belief that “Gary would have lived had I not be[en] thwarted in my rescue attempts.” See generally *id.* at 5a-6a (quoting petitioner’s account of the accident). Petitioner later underwent a VA medical examination for PTSD and again cited the death of Gary Holland as his in-service stressor. *Id.* at 6a.

In 1998, a VA regional office awarded petitioner a 50% disability rating, effective as of his original 1993 claim, for service-connected PTSD based on petitioner’s presence at, and role in, the incident that had caused Holland’s death. Pet. App. 6a. At petitioner’s request, the VA later increased that disability rating to 100% based upon petitioner’s reports concerning the effect of the Holland accident upon him. *Id.* at 6a-7a; see, *e.g.*, *id.* at 7a (noting petitioner’s report that he had “increased problems with anger control and that he has nightmares of the death of his friend”).

3. In a 2004 report, the VA’s Office of the Inspector General (OIG) concluded that significant aspects of petitioner’s account of Holland’s death were false. Pet. App. 7a. The Navy’s contemporaneous report of the accident that caused Holland’s death did not include petitioner’s name, and petitioner was not mentioned in any of the 19 witness statements collected at the time. *Ibid.* Witnesses interviewed by OIG investigators stated that petitioner had worked in a different shop and was not present at the scene of the accident. *Ibid.* Holland’s roommate at the time of the accident told OIG staff that neither he nor Holland had been friendly with petitioner. *Ibid.* The OIG report also noted that petitioner, when confronted with this evidence, became angry and “began to yell and curse” at investigators. *Id.* at 8a. The OIG

provided copies of its report to the VA regional office that had approved petitioner's claim, as well as to the local United States Attorney. *Ibid.*

In August 2004, after giving notice to petitioner, the VA regional office severed petitioner's benefits for fraud. Pet. App. 8a. Petitioner appealed the severance decision to the Board, which affirmed. See *id.* at 101a-154a. The Board found that petitioner had "made intentional misrepresentations of fact for the purpose of obtaining or retaining VA benefits, with knowledge that the misrepresentations may result in the erroneous award or retention of such benefits." *Id.* at 106a-107a; see 38 C.F.R. 3.1(aa)(2) (definition of "fraud"). The Board also rejected petitioner's argument that the agency was required to consider, before severing his benefits, whether petitioner's December 1969 arrest by shore patrol could have supplied an alternative in-service stressor to support his claim for service-connected PTSD. Pet. App. 8a-9a. The Board explained that petitioner's initial claim for VA benefits based on PTSD had not identified any stressor other than the false account of the Holland accident, and that the regional office's 1998 disability rating decision likewise had relied only on that stressor in awarding benefits. *Id.* at 9a.

4. The en banc Veterans Court affirmed in relevant part.¹ Pet. App. 25a-100a. The court unanimously upheld the Board's finding that petitioner had secured his

¹ The Veterans Court agreed with petitioner that, notwithstanding his fraud in obtaining benefits for service-connected PTSD, he might nonetheless qualify for service-connected disability benefits for dysthymia and depression. Pet. App. 55a-58a. The court remanded that aspect of petitioner's claim to the Board for further proceedings. *Id.* at 58a.

benefits through fraud. See *id.* at 39a-41a, 58a, 99a. The court also unanimously rejected petitioner’s argument, made for the first time before the Veterans Court, that the VA was required to refer any allegation of fraud to an administrative law judge for resolution under the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801 *et seq.*, which provides administrative remedies against persons who defraud government programs. Pet. App. 41a-42a. The court explained that, because petitioner had received more than \$320,000 in disability benefits as a result of his fraudulent statements, the Board could not have referred his case for resolution under the PFCRA, which is available only for false claims involving a monetary gain of \$150,000 or less. *Id.* at 42a (citing 31 U.S.C. 3803(c)(1) and 38 C.F.R. 42.6(a)(2)).²

² The Veterans Court divided over the question whether, in severing a veteran’s service-connected disability benefits for fraud, the VA is required to find that there was “clear[] and unmistakabl[e] erro[r]” (CUE) under 38 C.F.R. 3.105(d) in the original finding of a service connection. In its decision, the Board undertook a CUE analysis and found such error in the award of benefits to petitioner. See Pet. App. 130a-134a. A majority of the Veterans Court concluded, based on the language and history of the relevant regulations, that a CUE analysis is unnecessary to terminate a finding of service connection for fraud. *Id.* at 42a-53a. The dissent disagreed with this analysis and would have overturned the severance decision based on the agency’s asserted failure to show CUE in the original determination of service connection. See *id.* at 58a-99a (Hagel, J., dissenting in part). In the court of appeals, however, petitioner “expressly disclaimed that he was appealing that ruling, both in his brief and at oral argument.” *Id.* at 3a n.1. The court of appeals accordingly explained that it would “pass no judgment on the Veterans Court’s holding that severance of benefits based on fraud is not subject to a clear and unmistakable error” analysis. *Ibid.*; see also *id.* at 9a n.3. The CUE issue is therefore not before this Court.

5. The court of appeals affirmed. Pet. App. 1a-22a. The court explained that its review of decisions by the Veterans Court is limited under 38 U.S.C. 7292(a) to pure questions of law involving the interpretation of statutes and regulations, and that the court consequently lacked jurisdiction over petitioner's various factual challenges to the agency's finding of fraud. Pet. App. 11a-12a & n.4. The court nonetheless understood petitioner to raise two legal questions that the court had jurisdiction to decide: whether the VA had erred in failing to refer petitioner's fraud case to an administrative law judge under the PFCRA, and whether the agency had erred in failing to consider evidence of alternative in-service stressors before severing his PTSD benefits. *Id.* at 11a-12a. As to both of those questions, the court rejected petitioner's arguments.

The court of appeals concluded that petitioner's reliance on the PFCRA was flawed for "several reasons." Pet. App. 14a. The court first explained that "the PFCRA is not an exclusive remedy." *Ibid.* Rather, because the remedies provided by the PFCRA are "in addition to any other remedy that may be prescribed by law," *ibid.* (quoting 31 U.S.C. 3802(a)(1)), the statute "would have no effect on the VA's ability to sever [petitioner's] benefits," *ibid.*, even if the VA could have proceeded against petitioner under the PFCRA. The court further explained that the PFCRA "does not apply" in any event when the amount in dispute exceeds \$150,000, and that the total benefits petitioner had fraudulently obtained exceeded that amount. *Id.* at 14a-15a. The court also concluded that requiring the agency to proceed under the PFCRA would be "inconsistent with the statutes and regulations that specifically refer to sever-

ance of service connection based on fraud.” *Id.* at 15a-16a (citing 38 U.S.C. 1159 and 38 C.F.R. 3.957).

The court of appeals also rejected petitioner’s argument that the VA had violated his Fifth and Sixth Amendment rights by failing to refer his case to an administrative law judge under the PFCRA. Pet. App. 17a. The court explained that this argument merely restated in constitutional terms petitioner’s mistaken contention that the VA was required to act through the PFCRA to sever his benefits. *Ibid.* The court also found no merit to petitioner’s contention that the VA’s procedures had otherwise denied petitioner his right to procedural due process. *Id.* at 17a-18a. The court noted that, before severing his benefits, the VA had provided petitioner with a detailed explanation of the reasons for the agency’s action; that petitioner had been afforded a live hearing before the Board; and that petitioner had been represented by counsel and had testified on his own behalf. *Id.* at 18a.

Finally, the court of appeals addressed petitioner’s argument that, before severing his PTSD benefits based on fraud, the VA was required to consider alternative in-service stressors that might have supported his claim. Pet. App. 18a-19a. The court agreed with the Veterans Court and the Board that petitioner had “presented only one stressor as part of his initial claim, which the Board ultimately determined to be fraudulent.” *Id.* at 19a. The court concluded that, although petitioner is free to pursue a separate claim based on any additional stressors he can now identify, the Board “was not required to consider other stressors as part of the severance proceeding.” *Ibid.* (internal quotation marks and citation omitted).

6. In 2005, while petitioner's appeal from the VA's severance decision was pending, a federal grand jury in the Eastern District of Wisconsin returned an indictment charging petitioner with five counts of wire fraud based on his fraudulent receipt of VA disability benefits. Pet. App. 10a. After a jury trial, petitioner was convicted on all counts. *Ibid.* The district court sentenced petitioner to 48 months of imprisonment and ordered him to pay \$262,943.52 in restitution. *Ibid.* The Seventh Circuit affirmed his conviction, see *United States v. Roberts*, 534 F.3d 560 (2008), and this Court denied certiorari, 555 U.S. 1139 (2009).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The VA properly severed petitioner's service-connected disability benefits after determining that he had procured those benefits through fraud. That factual determination was upheld by the Board, Pet. App. 141a, and unanimously affirmed by the Veterans Court, *id.* at 39a-41a. The Federal Circuit found no legal error in the Veterans Court's decision. *Id.* at 12a-19a; see 38 U.S.C. 7292(a). Petitioner does not contend that the court of appeals' decision creates or exacerbates any conflict of authority among the circuits, and petitioner's criminal conviction on five counts of wire fraud confirms the propriety of the VA's action.

2. Petitioner contends (*e.g.*, Pet. 23-25) that the VA severed his benefits without affording him the procedural protections to which he was legally entitled. That argument lacks merit.

a. As the court of appeals explained, the VA afforded petitioner all of the procedural safeguards guaranteed under its regulations. Pet. App. 18a; see 38 C.F.R. 3.103(a) (“Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation.”). In August 2004, the agency sent petitioner written notice of the proposed severance of his benefits, together with a cover sheet explaining his right to submit evidence, request a hearing, and retain representation. Pet. App. 17a. The notice included five paragraphs detailing the findings of the OIG investigation and the reasons the VA believed that petitioner’s claims were fraudulent. *Id.* at 17a-18a. When petitioner challenged the severance determination before the Board, he was afforded a hearing at which he was represented by counsel and at which both petitioner and his wife testified. *Id.* at 18a. The court of appeals correctly held that these procedures satisfied the requirements of the Due Process Clause. *Ibid.*

b. Petitioner’s due process arguments principally reflect his view that the VA was required to proceed against him under the PFCRA, 31 U.S.C. 3801 *et seq.*, and to afford him all of the procedural safeguards that are provided to persons charged with fraud under that Act. See, *e.g.*, Pet. 26 (asserting that petitioner “was entitled to a full adversarial hearing with counsel and the attendant due process protections envisioned by Congress in the PFCRA”); Pet. 28-29. Cf. 31 U.S.C. 3803 (procedures for PFCRA hearings). The court of appeals correctly rejected that contention. See Pet. App. 12a-18a.

The PFCRA is a “sister scheme” to the False Claims Act that creates administrative remedies for false claims

involving relatively small sums. Pet. App. 13a; see *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 & n.17 (2000). Where the PFCRA applies, it provides an optional mechanism for federal agencies to obtain redress for false claims through civil penalties imposed in formal administrative proceedings. See 31 U.S.C. 3801(a)(1) and (2). The statute makes clear, however, that the remedies it provides are “in addition to any other remedy that may be prescribed by law.” 31 U.S.C. 3801(a)(1).

The court of appeals therefore correctly held that the PFCRA does not affect, let alone displace, the VA’s independent authority to cease paying disability benefits that were obtained through fraud. Pet. App. 14a, 15a-16a; see 38 U.S.C. 1159 (finding of service connection may be set aside “upon a showing that the original grant of service connection was based on fraud”); 38 C.F.R. 3.957 (same). Indeed, the authority of the VA to cut off disability benefits prospectively—the only decision at issue here—is entirely distinct from its ability, under the PFCRA and other mechanisms, to recoup payments previously made as a result of fraud. See Pet. App. 16a-17a. In this case, the government recouped its prior payments to petitioner by prosecuting him for wire fraud and obtaining a criminal restitution order, a result “entirely compatible with the PFCRA.” *Id.* at 17a.

In any event, as both the court of appeals and the Veterans Court observed, the VA could not have proceeded against petitioner under the PFCRA because the Act excludes fraud cases, such as this one, involving amounts greater than \$150,000. Pet. App. 14a-15a; see *id.* at 41a-42a; see also 31 U.S.C. 3803(c)(1); 38 C.F.R. 42.6(a)(2). “[T]he record clearly reflects that [petitioner’s] fraudulent claims exceeded” that limit. Pet.

App. 15a; see *ibid.* (noting that petitioner was ordered to pay more than \$260,000 in restitution as a result of his criminal conviction). It therefore is particularly clear that the VA did not deprive petitioner of due process by failing to employ the specific procedural mechanisms that Congress prescribed under that Act. See *id.* at 17a. Further review is not warranted.

3. Petitioner also contends (Pet. 17-19) that the VA should have considered additional evidence in his medical records (apart from his fraudulent account of the Holland incident) that might have supported his claim for PTSD disability benefits. That fact-bound argument lacks merit and does not warrant this Court's review. Petitioner "presented only one stressor as part of his initial claim, which the Board ultimately determined to be fraudulent." Pet. App. 19a. Thus, as the Veterans Court explained, "the Board did not adjudicate a claim for service connection for PTSD based on stressors *other than* the stressor found to be fraudulent," and it "was not required to do so as part of the severance proceeding." *Id.* at 54a n.6. Petitioner remains free to pursue a new claim for PTSD disability benefits based on any alternative in-service stressors that he can legitimately establish. See *id.* at 19a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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