No. 13-837

In the Supreme Court of the United States

ARNOLD J. PARKS, 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 United States Court of Appeals for Veterans Claims (Veterans Court) must entertain a challenge to the competency of a Department of Veterans Affairs medical professional when that challenge was raised for the first time before the Veterans Court, the issue was not reasonably raised by the record, and the evidence in support was not included in the record.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-16a) is reported at 716 F.3d 581. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 18a-24a) is reported at 2011 WL 6358019. The opinion of the Board of Veterans' Appeals (Pet. App. 25a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2013. A petition for rehearing was denied on October 16, 2013 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on January 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

The issue in this case is whether petitioner forfeited his challenge to the competency of a Department of Veterans Affairs (VA) advanced registered nurse practitioner by failing to assert that challenge until his case reached the United States Court of Appeals for Veterans Claims (Veterans Court). The Veterans Court declined to address that challenge, and the court of appeals affirmed.

1. A veteran seeking benefits for a service-connected disability must file a claim for compensation at one of VA's regional offices. 38 U.S.C. 5101(a)(1). The burden is on the veteran "to present and support a claim for benefits under laws administered by the Secretary [of Veterans Affairs]." 38 U.S.C. 5107(a). VA is required to provide significant assistance to veterans in obtaining the information necessary for veterans to substantiate their claims, and it must afford a veteran the benefit of the doubt on issues where the evidence is in equipoise. 38 U.S.C. 5103A, 5107(b); see generally *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1200-1201 (2011).

A veteran may appeal an adverse decision by the regional office to the Board of Veterans' Appeals (Board). 38 U.S.C. 7104(a). The veteran's appeal "should set out specific allegations of error of fact or law," and the Board "may dismiss any appeal which fails to allege [such specific errors] in the determination being appealed." 38 U.S.C. 7105(d)(3) and (5); see

38 C.F.R. 20.202 (same). Any decision by the Board "shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record." 38 U.S.C. 7104(a); see 38 C.F.R. 19.7 ("Decisions of the Board are based on a review of the entire record."). A Board decision constitutes the final determination of the Secretary of Veterans Affairs (Secretary) with respect to the veteran's claim. 38 U.S.C. 7104(a).

A veteran may seek review of final Board decisions in the Veterans Court. 38 U.S.C. 7261. Such review "shall be on the record of proceedings before the Secretary and the Board." 38 U.S.C. 7252(b); see 38 U.S.C. 7261(b) (stating that, in deciding each case, the Veterans Court "shall review the record of proceedings before the Secretary and the Board"). The court's review of factual determinations is deferential. It may set aside "a finding of material fact" only "if the finding is clearly erroneous," 38 U.S.C. 7261(a)(4), and "in no event" shall such findings "be subject to trial de novo by the Court," 38 U.S.C. 7261(c). Decisions of the Veterans Court may be appealed to the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292.

2. Petitioner served on active duty in the United States Army from March 1964 to March 1966. Pet. App. 6a, 26a. During that time, he volunteered for a Department of Defense program known as Project 112, which tested the United States military's preparedness for shipboard and land-based biological and chemical warfare. *Id.* at 6a. As part of Project 112, petitioner was intentionally exposed to three chemical-warfare agents. *Ibid.*

a. In 2000 and 2002, petitioner submitted disability compensation claims to VA for diabetes mellitus and a heart disability, asserting that both were secondary to in-service chemical exposure. Pet. App. 6a. Both claims were denied by the regional office, and petitioner appealed to the Board. *Id.* at 6a-7a.

At approximately the same time, VA issued a directive setting forth its policy regarding Project 112. The directive explained that "the Veterans Health Care, Capital Asset, and Business Improvement Act of 2003" permitted veterans who had volunteered for Project 112 to receive "a thorough clinical evaluation" and priority enrollment in the VA health care system, and "to be eligible for VA health care at no cost for any illness possibly related to their participation in that project." Pet. App. 7a; Gov't C.A. Br. 3. VA also sent petitioner a letter identifying the various chemical agents to which he had been exposed as part of Project 112. *Ibid.*

In 2007, the Board remanded petitioner's appeal to VA so that he could receive a complete examination to determine whether his diabetes and heart condition were linked to his participation in Project 112. Pet. App. 7a. In May 2008, petitioner was examined by Sheri Larson, an advanced registered nurse practitioner (ARNP) selected by VA. *Id.* at 8a; Pet. C.A. Br. 12. Larson concluded—based on her physical examination of petitioner, his medical history (including a 40-year, pack-a-day cigarette smoking habit), and a review of the relevant medical literature—that petitioner's medical conditions were "less likely than not secondary to his confirmed chemical exposures" in the course of Project 112. Pet. App. 8a (internal quotation marks omitted); Gov't C.A. Br. 5.

In December 2008, the VA regional office issued a supplemental statement once again rejecting petitioner's claim for benefits. C.A. App. A170-A175. The decision relied on Larson's report, along with "other public medical authorities regarding the effects of the pertinent chemicals" to which petitioner had been exposed. Pet. App. 8a.

b. Petitioner appealed to the Board. He argued that the regional office should not have relied on Larson's report because it "was not signed by a medical doctor," allegedly in violation of VA internal guidance. C.A. App. A40; see Pet. App. 14a.

In March 2010, the Board denied petitioner's appeal with respect to his diabetes and heart disorder. Pet. App. 27a. The Board concluded that petitioner's claim had been properly evaluated by VA following the 2007 remand order, and it found that his conditions were not related to his military service. In reaching that conclusion, the Board relied on the fact that petitioner had experienced no symptoms for decades following his participation in Project 112, his longstanding smoking habit, and the VA medical examination conducted by Larson. *Id.* at 8a-9a, 34a-35a.

c. Petitioner appealed to the Veterans Court. For the first time in the case, petitioner argued that Larson's report did not constitute "competent medical evidence," as required by 38 C.F.R. 3.159(a)(1). In support of that contention, he cited the Oklahoma Board of Nursing website, which showed that Larson was certified as an advanced registered nurse practitioner qualified in family practice (ARNP-Family), without any "specialized knowledge related to the

physiological effects of biochemical agents used by the military." Pet. Vet. Ct. Br. 10-13.

The Veterans Court affirmed. Pet. App. 18a-24a. As relevant here, the court explained that, under its prior decision in *Cox* v. *Nicholson*, 20 Vet. App. 563 (2007), a nurse practitioner's medical education and training allows him or her to provide competent medical "diagnoses, statements, or opinions." Pet. App. 20a (citing *Cox*, *supra*, and 38 C.F.R. 3.159(a)(1)). The court reasoned that, "[w]hile [petitioner] may believe * * * his specific claim requires a specialist, [his] belief is not supported by the law." *Id.* at 21a. The court also declined to address petitioner's argument based on Larson's background in family practice, noting that the information about her specialty and Oklahoma nursing license were not contained in the record. The Veterans Court explained that, because its review was based "on 'the record of proceedings before the Secretary and the Board of Veterans' Appeals,'" the court would "not address this argument further." *Id.* at 22a (quoting 38 U.S.C. 7261(b)).

d. The court of appeals affirmed. Pet. App. 5a-16a. The court held that the VA is entitled to a presumption "that it has properly chosen a person who is qualified to provide a medical opinion in a particular case." *Id.* at 12a (citing *Sickels* v. *Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011)). The court noted, however, that the presumption is "rebuttable," and that a veteran may "challeng[e] the qualifications of a VA-selected" expert by "set[ting] forth specific reasons why the veteran believes the expert is not qualified to give a competent opinion." *Id.* at 12a-13a (citing *Bastien* v. *Shinseki*, 599 F.3d 1301, 1307 (Fed. Cir. 2010)).

The court of appeals held that petitioner had forfeited any challenge to Larson's qualifications by failing to object or introduce relevant evidence during the Board proceedings. Pet. App. 13a-16a. The court explained that petitioner had "never raised any concern over Ms. Larson's qualifications or those of an ARNP generally, let alone sought to overcome the presumption [that a VA-selected medical expert is qualified] until his appeal to the Veterans Court." *Id.* at 14a. Rather, the court noted, petitioner's "only" assertion to the Board was that "the report prepared by Larson should have been excluded because, contrary to VA operating procedures, a physician had not signed it." *Ibid.*

The court of appeals acknowledged the established rule that "the record must be construed sympathetically in favor of *pro se* veterans." Pet. App. 15a. The court found that the rule was not implicated here, however, because petitioner had "never suggested" during the regional-office and Board proceedings "that there was anything improper with the VA's selection of an ANRP," and had never "raised objection to Ms. Larson specifically." *Ibid.* (discussing *Comer* v. *Peake*, 552 F.3d 1363, 1369 (Fed Cir. 2009)). The court further held that, "[o]n this record, the Veterans Court did not abuse its discretion in deciding not to remand" the issue of Larson's competency to the Board. *Id.* at 16a.

e. Petitioner sought rehearing and rehearing en banc. For the first time, petitioner argued that this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000), excused his failure to challenge Larson's competence until his appeal to the Veterans Court. See Pet. App.

50a-53a. The court of appeals denied the petition. *Id.* at 3a-4a.

ARGUMENT

Petitioner contends (Pet. 8-19) that a veteran can introduce evidence challenging the competency of a VA medical examiner for the first time in the Veterans Court, without first presenting that evidence to the VA regional office or to the Board. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. In addition, nothing in the court's decision bars petitioner from challenging Larson's competence by filing a motion to reopen his claim under 38 U.S.C. 5108. Further review is not warranted.

1. The court of appeals correctly held that petitioner could not challenge Larson's competence in the Veterans Court because he had not raised any such challenge before the regional office or the Board. That challenge rests entirely on new evidence, not contained in the record, concerning Larson's Oklahoma nursing certification and family-practice speciality. The Veterans Court lacked authority to consider that evidence, and petitioner's only option in these circumstances is to file a motion to reopen his claim under 38 U.S.C. 5108.

a. As the court of appeals correctly explained, VA is entitled to a rebuttable presumption that the medical professional it selects to conduct a particular examination is qualified to perform that task. Pet. App. 12a; *Sickels* v. *Shinseki*, 643 F.3d 1362, 1365-1366 (Fed. Cir. 2011); *Rizzo* v. *Shinseki*, 580 F.3d 1288, 1291-1292 (Fed. Cir. 2009). Petitioner does not challenge the validity of that presumption in this Court.

Because a VA medical examiner is presumed competent, the VA need not present evidence to establish such competence in every case. *Rizzo*, 580 F.3d at 1291-1292 (rejecting a "requirement that VA must present affirmative evidence" of medical professional's qualification "as a precondition for the Board's reliance upon" that professional's opinion). Rather, "when a veteran suspects a fault with the medical examiner's qualifications, it is incumbent upon the veteran to raise the issue before the Board." *Sickels*, 643 F.3d at 1365; see *Rizzo*, 580 F.3d at 1291.

Petitioner did not introduce any evidence before the Board sufficient to rebut the presumption that Larson was competent to conduct his medical examination. The Board was therefore entitled to presume that she was competent, and to rely on her expert medical opinion when denying petitioner's claim for benefits. The court of appeals properly recognized that petitioner had forfeited any objection to Larson's competence by failing to raise that challenge during the Board proceedings. Pet. App. 14a-16a.

b. The governing statute confirms the court of appeals' conclusion that petitioner could not rely on new evidence to challenge Larson's qualifications for the first time in the Veterans Court. Most importantly, Section 7252(b) states that the Veterans Court's review of any Board decision "shall be *on the record of proceedings* before the Secretary and the Board." 38 U.S.C. 7252(b) (emphasis added); see 38 U.S.C. 7261(b) (stating that, in deciding each case, the Veterans Court "shall review the *record of proceedings* before the Secretary and the Board") (emphasis added); see also Vet. Ct. R. 28.1(a)(1) (discussing preparation and contents of the formal "Record of Proceed-

ings"). That requirement, which the Federal Circuit has held is "jurisdictional," precludes the Veterans Court from considering evidence that was not presented to the VA regional office or to the Board. See, *e.g.*, *Kyhn* v. *Shinseki*, 716 F.3d 572, 575-576 (2013).[1]

Petitioner cites *Maggitt* v. *West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000), for the proposition that the Veterans Court "has jurisdiction to hear arguments presented to it in the first instance, provided it otherwise has jurisdiction over the veteran's claim." Pet. 13. But nothing in *Maggitt* suggests that the Veterans Court may address new *evidence* that was never presented to the VA regional office or to the Board and therefore is not part of the "record of proceedings." Allowing the Veterans Court to consider such new evidence would violate the plain terms of 38 U.S.C. 7252(b). It would also be inconsistent with the Federal Circuit's subsequent decision in *Kyhn*, 716 F.3d at 575-576, which held that the Veterans Court lacks jurisdiction to consider such evidence.

c. To the extent petitioner implies that the Veterans Court should have responded to petitioner's submission of new evidence by remanding the claim back to the Board, he is also incorrect. The governing statute and regulations recognize that new evidence may sometimes arise after the regional office has

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[1] In addition to the jurisdictional restrictions on considering new evidence, the VA statute and regulations also make clear that a veteran should clearly and specifically identify to the Board any alleged errors in the VA regional office's disposition of the claim. See, *e.g.*, 38 U.S.C. 7105(d)(3) (stating that the veteran's appeal "should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case"); 38 C.F.R. 20.202 (same).

ruled on the veteran's claim in the first instance. See generally 38 U.S.C. 5108, 7105(e)(1); 38 C.F.R. 3.156(a)-(b), 3.400(q), 20.800, 20.1304. The statute and regulations establish detailed rules governing the treatment of such evidence. They provide no support, however, for petitioner's view that new evidence introduced for the first time *after* a final Board decision must be considered part of his original claim for benefits. See generally *Bonhomme* v. *Nicholson*, 21 Vet. App. 40, 43-44 (2007) (explaining statutory and regulatory scheme).

The VA regulations provide that, if new evidence is submitted within 90 days after the certification of an appeal to the Board, such evidence may be considered directly by the Board or referred to the regional office for consideration in the first instance, as the veteran prefers. 38 C.F.R. 20.1304(a) and (c). If the new evidence is submitted after that 90-day period, but before the Board has made its decision, the Board may accept or refer the evidence, but only if "the appellant demonstrates on motion that there was good cause for the delay." 38 C.F.R. 20.1304(b)(1) and (b)(1)(ii). If no good cause is shown, such evidence "will be referred to the [regional office] upon completion of the Board's action on the pending appeal without action by the Board concerning the request or additional evidence." 38 C.F.R. 20.1304(b)(1)(i). Either way, so long as the new evidence is submitted *before* a final Board decision, that evidence is treated as part of the original claim for benefits and does not change the effective date that would apply to any award of benefits for such claim. See 38 C.F.R. 3.156(b), 3.400(q)(1); *Jackson* v. *Nicholson*, 449 F.3d 1204, 1206-1207 (Fed. Cir. 2006).

By contrast, 38 U.S.C. 5108 makes clear that, if the new evidence is submitted to VA *after* the Board has "disallowed" a claim—as, for example, when the claim is pending on appeal to the Veterans Court—"the Secretary shall reopen the claim and review the former disposition of the claim." 38 U.S.C. 5108; 38 C.F.R. 3.156(a); see *Jackson*, 449 F.3d at 1206-1208. In this circumstance, however, the new evidence is treated as a "new claim" for benefits, and the effective date of any award based on that new claim can be no earlier than the date on which the veteran submitted that new claim based on the new evidence. See 38 U.S.C. 5110(a); 38 C.F.R. 3.400(q)(2) (noting that, when "[n]ew and material evidence" is "[r]eceived after final disallowance" of a claim, the effective date of any award is based on the "[d]ate of receipt of new claim or [the] date entitlement arose, whichever is later"); *Jackson*, 449 F.3d at 1206-1207; *Sears* v. *Principi*, 349 F.3d 1326, 1328-1331 (Fed. Cir. 2003) (explaining that VA regulations "treat[] a reopened claim as a 'new' claim"), cert. denied, 541 U.S. 960 (2004).

Here, petitioner wishes to have VA consider new evidence about Larson's qualifications. He submitted the new evidence, however, only *after* the Board had finally disallowed his claim in March 2010. In such circumstances, his only proper remedy was to ask VA to reopen his claim, based on the new evidence, pursuant to 38 U.S.C. 5108 and 38 C.F.R. 3.156(a). Under 38 C.F.R. 3.400(q)(2), this reopened claim would have been treated as a "new claim," and the effective date of any award would have been calculated based on his submission of that new claim (which typically would coincide with the agency's receipt of the new evidence). See, *e.g.*, *Akers* v. *Shinseki*, 673 F.3d 1352,

1357-1358 (Fed. Cir. 2012); *Jackson*, 449 F.3d at 1206-1208.

To the extent petitioner seeks a remand from the Veterans Court to the Board for consideration of his new evidence as part of his *original* claim for benefits, he is simply trying to evade the requirements of 38 U.S.C. 5108 and 38 C.F.R. 3.156(a). Allowing claimants to proceed in this fashion would turn the Veterans Court into "a mere procedural reset button where any appellant could obtain unlimited remands simply by submitting some new document to VA, which the Court would have to assume is relevant." *Bonhomme*, 21 Vet. App. at 44; cf. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (explaining that judicial review of agency action is not a "ping-pong game"). The court of appeals correctly refused to allow petitioner to present his new evidence for the first time to the Veterans Court.

d. As the discussion above makes clear, petitioner had—*and still has*—the right to present his new evidence to VA by filing a motion to reopen his claim under Section 5108. Petitioner is therefore wrong to assert (Pet. 4) that the court of appeals' decision "denie[s him] the opportunity to challenge the competence of the nurse practitioner who provided the opinion relied on to reject his claims." Petitioner may still present evidence challenging Larson's qualifications (along with any other evidence showing his entitlement to benefits), provided he complies with the pertinent statutory and regulatory requirements.

2. Petitioner argues that the lower courts' refusal to consider his new challenge to Larson's qualifications conflicts with this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000). In *Sims*, the Court held

that issue exhaustion is not appropriate in nonadversarial proceedings before the Social Security Administration, where it was not required by statute or regulation. *Id.* at 105-108. Petitioner asks this Court (Pet. 8-26) to grant certiorari to apply *Sims* and resolve an alleged conflict among the courts of appeals as to its application. For at least three reasons, petitioner's *Sims*-based argument does not warrant this Court's review. Petitioner forfeited any argument based on *Sims* by failing to raise it below; *Sims* does not apply to the circumstances presented here; and there is no actual conflict among the circuits.

a. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see *Decker* v. *Northwest Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013) (stating that this Court is "a court of review, not of first view") (citation omitted); *Lee* v. *Kemna*, 534 U.S. 362, 388 (2008) ("We ordinarily do not decide in the first instance issues not decided below.") (citation and internal quotation marks omitted).

Petitioner did not cite *Sims* in his briefs below, despite the government's argument that petitioner could not raise his challenge to Larson's qualifications in the Veterans Court for the first time. Neither the Veterans Court nor the court of appeals addressed the *Sims* issue now presented in his petition. In these circumstances, this Court should follow its "traditional rule" and decline to address an argument that petitioner failed to preserve below.[2]

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[2] Petitioner first raised the *Sims* issue in his petition for rehearing en banc, but by that time the argument had been forfeited.

b. In any event, the court of appeals' decision in this case does not contravene *Sims*. The question presented in that case was whether a claimant for Social Security benefits could raise an argument in federal district court when she had not specifically advanced that argument before the Social Security Appeals Council in her appeal of an adverse decision by an Administrative Law Judge (ALJ). *Sims*, 530 U.S. at 104-105. This Court held that issue exhaustion was not required in those circumstances. *Id.* at 105. The Court emphasized that no applicable statute or regulation required issue exhaustion before the Appeals Council, *id.* at 106-110, and a four-Justice plurality found it inappropriate for courts to require such exhaustion in light of the informal and nonadversarial nature of the Social Security claims process, *id.* at 110-112. Justice O'Connor concurred, concluding that "the agency's failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision." *Id.* at 113 (O'Connor, J., concurring in part and in the judgment).

For at least three reasons, the Court's decision in *Sims* is not controlling here. First, the Court in *Sims* did not address the question whether a claimant could obtain judicial review of a claim she had failed to raise at *any* stage of the agency proceedings, which is the situation here. See 530 U.S. at 107 ("Whether a

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See, *e.g.*, *Smithkline Beecham Corp.* v. *Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived."); *Chaidez* v. *United States*, 133 S. Ct. 1103, 1113 n.16 (2013) (declining to reach issue raised only in a petition for rehearing en banc because "we are a court of review, not of first view") (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

claimant must exhaust issues before the ALJ is not before us."); see also *id.* at 117 (Breyer, J., dissenting) ("I assume the plurality would not forgive the requirement that a party ordinarily must raise all relevant issues before the ALJ."). Rather, it addressed only whether a claimant's failure to raise an issue before the Social Security Appeals Council blocked her ability to raise that issue in district court. Because petitioner failed to challenge Larson's qualifications at *any* stage in the VA administrative proceedings, *Sims* would not support her current argument, even if that decision were extended to requests for VA benefits.

Second, unlike the present case, *Sims* did not involve a circumstance in which a claimant sought to introduce in court new *evidence* that had not previously been presented to the agency. Rather, the Court in *Sims* addressed only whether the claimant could raise new *arguments* that had not been presented to the Appeals Council. See 530 U.S. at 105-106. *Sims* therefore does not support petitioner's claimed entitlement to present to the Veterans Court in the first instance the evidence of Larson's family-practice specialty and Oklahoma nursing certification.[3]

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[3] If the claimant in *Sims* had sought to introduce new evidence, her right to do so would have turned not on general, judicially-imposed principles of issue exhaustion, but rather on the text of 42 U.S.C. 405(g), which specifies when a district court may consider new evidence presented for the first time to that court in cases involving Social Security benefits. See *ibid.* ("The court may * * * at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding."); *Sims*, 530 U.S. at 106-110 (addressing

Third, the rules governing the introduction of new evidence in veterans-benefits proceedings are established by statute and regulation. See pp. 10-12, *supra* (discussing statutory and regulatory regime). The decision in *Sims*, by contrast, rested explicitly on the Court's recognition that the statutes and regulations governing Social Security benefits did *not* expressly require issue exhaustion in Appeals Council proceedings. 530 U.S. at 107-108. Nothing in *Sims* suggests that a court may disregard statutory or regulatory provisions that require supporting evidence or argument to be submitted at a particular stage of the administrative process. To the contrary, the Court in *Sims* recognized that "it is common for an agency's regulations to require issue exhaustion in administrative appeals," and that "when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Id*. at 108.

Petitioner appears to acknowledge (Pet. 11-15) that *Sims* cannot trump the statutory and regulatory scheme that governs VA proceedings. But his lengthy

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whether a "judicially imposed issue exhaustion requirement" was appropriate only because the relevant statutes and regulations were silent on that issue). Since *Sims*, the courts of appeals have continued to apply Section 405(g) when deciding how to address new evidence presented for the first time in district court. Those courts have not assumed that *Sims* settles that question by permitting the claimant to rely on such evidence (as petitioner argues here). See, *e.g.*, *Simila* v. *Astrue*, 573 F.3d 503, 522 (7th Cir. 2009); *Ingram* v. *Commissioner of Soc. Sec. Admin.*, 496 F.3d 1253, 1267-1269 (11th Cir. 2007); *Jens* v. *Barnhart*, 347 F.3d 209, 214 (7th Cir. 2003); *Krishnan* v. *Barnhart*, 328 F.3d 685, 691-693 (D.C. Cir. 2003); *Mills* v. *Apfel*, 244 F.3d 1, 5-6 (1st Cir. 2001), cert. denied, 534 U.S. 1085 (2002).

discussion of that scheme ignores the key provisions addressing the circumstances in which veterans may introduce new evidence at different stages in the proceedings. Most significantly, petitioner fails to explain how allowing a veteran to rely on new evidence introduced for the first time in the Veterans Court is compatible with the statutory requirements that the court base its decision on the existing "record of the proceedings," 38 U.S.C. 7252(b), and that a veteran present new evidence "with respect to a claim which has been disallowed [by the Board]" in a motion to reopen under 38 U.S.C. 5108.

c. Petitioner also argues (Pet. 20-24) that this Court's review is warranted in order to resolve a conflict among the courts of appeals as to the proper application of *Sims*. Specifically, he asserts (Pet. 20) that, apart from the Federal Circuit, "every other circuit court of appeals that has considered the issue" has "followed *Sims* and declined to impose issue exhaustion during review of nonadversarial and inquisitorial administrative proceedings where not required by statute or regulation." Petitioner's alleged conflict is illusory and does not support further review.

Petitioner does not (and could not reasonably) contend that there is any actual conflict among the circuits on the precise question presented in his petition, *i.e.*, whether "issue exhaustion" is required "during nonadversarial proceedings before the Department of Veterans Affairs Board of Veterans' Appeals." Pet. i. Nor has any court of appeals held that a veteran may introduce new evidence directly in the Veterans Court and have that evidence considered as part of his original claim for benefits. On the contrary, the Federal Circuit's exclusive jurisdiction over appeals from the

Veterans Court, see 38 U.S.C. 7292, has properly ensured uniformity and consistency in this area of law.

The Court in *Sims* recognized that statutory and regulatory commands will ultimately trump judicially-imposed rules governing issue exhaustion. See 530 U.S. at 107-108. Here, the relevant statute and regulations make clear that veterans may not introduce new evidence for the first time in the Veterans Court. See pp. 10-12, *supra*. The fact that other courts may have reached different conclusions under different statutory and regulatory schemes is unremarkable and does not suggest the existence of a circuit conflict.

Petitioner's asserted conflict is also premised on an overly-expansive interpretation of the decision below. The court of appeals did not categorically impose an "issue exhaustion" requirement on all veterans claim proceedings, as petitioner suggests. In fact, the court did not use the term "issue exhaustion" at all, and it framed the question before it quite narrowly: "[T]he issue here is whether [petitioner] waived his right to overcome the presumption that the selection of a particular medical professional means that the person is qualified for the task." Pet. App. 11a. The court's analysis relied primarily on the existence of that presumption in this unique context, and it did not turn on principles governing the application of issue exhaustion more broadly. See *id.* at 11a-14a. Nor did the court purport to overrule its prior decision in *Maggitt*, which recognized that issue exhaustion is *not* categorically required, and that in certain circumstances "the Veterans Court may hear legal arguments raised for the first time with regard to a claim that is properly before [it]." 202 F.3d at 1377-1378; see Pet. 13. The court of appeals' resolution of the narrow issue pre-

sented here does not conflict with any decision of another circuit and does not warrant this Court's review.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner also contends (Pet. 24-26) that the decision below conflicts with the interpretation of *Sims* set forth in the Federal Circuit's own precedents. That assertion is incorrect, as none of the cited decisions addressed the issue presented here. In any event, intra-circuit disagreement is not traditionally a basis for this Court to grant certiorari. See Sup. Ct. R. 10.

APPENDIX

1. 38 U.S.C. 5108 provides:

Reopening disallowed claims

If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.

2. 38 U.S.C. 5110(a) provides:

Effective dates of awards

(a) Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

3. 38 U.S.C. 7104 provides in pertinent part:

Jurisdiction of the Board

(a) All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

(b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.

* * * * *

4. 38 U.S.C. 7105 provides in pertinent part:

Filing of notice of disagreement and appeal

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Secretary.

* * * * *

(d)(1) Where the claimant, or the claimant's representative, within the time specified in this chapter, files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency shall prepare a statement of the case. A statement of the case shall include the following:

(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.

(B) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.

(C) The decision on each issue and a summary of the reasons for such decision.

(2) A statement of the case, as required by this subsection, will not disclose matters that would be contrary to section 5701 of this title or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is such that disclosure to the representative would be as harmful as if made to the claimant.

(3) Copies of the "statement of the case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to time-

liness or adequacy of response shall be determined by the Board of Veterans' Appeals.

(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement.

(5) The Board of Veterans' Appeals may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

(e)(1) If, either at the time or after the agency of original jurisdiction receives a substantive appeal, the claimant or the claimant's representative, if any, submits evidence to either the agency of original jurisdiction or the Board of Veterans' Appeals for consideration in connection with the issue or issues with which disagreement has been expressed, such evidence shall be subject to initial review by the Board unless the claimant or the claimant's representative, as the case may be, requests in writing that the agency of original jurisdiction initially review such evidence.

(2) A request for review of evidence under paragraph (1) shall accompany the submittal of the evidence.

5. 38 U.S.C. 7252 provides:

Jurisdiction; finality of decisions

(a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not

seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

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

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

6. 38 U.S.C. 7261 provides in pertinent part:

Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

(1) 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;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Vet-

erans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

* * * * *

7. 38 C.F.R. 3.156 provides in pertinent part:

New and material evidence.

(a) *General.* A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

(b) *Pending claim.* New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of §20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

* * * * *

8. 38 C.F.R. 3.400 provides in pertinent part:

General.

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later.

* * * * *

(q) *New and material evidence (§3.156) other than service department records*—(1) *Received within appeal period or prior to appellate decision.* The effective date will be as though the former decision had not been rendered. See §§20.1103, 20.1104 and 20.1304(b)(1) of this chapter.

(2) *Received after final disallowance.* Date of receipt of new claim or date entitlement arose, whichever is later.

* * * * *

9. 38 C.F.R. 19.7(a) provides:

The decision.

(a) *Decisions based on entire record.* The appellant will not be presumed to be in agreement with any statement of fact contained in a Statement of the Case to which no exception is taken. Decisions of the Board are based on a review of the entire record.

10. 38 C.F.R. 20.202 provides:

Rule 202. Substantive Appeal.

A Substantive Appeal consists of a properly completed VA Form 9, "Appeal to Board of Veterans' Appeals," or correspondence containing the necessary information. If the Statement of the Case and any prior Supplemental Statements of the Case addressed several issues, the Substantive Appeal must either indicate that the appeal is being perfected as to all of those issues or must specifically identify the issues appealed. The Substantive Appeal should set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination, or determinations, being appealed. To the extent feasible, the argument should be related to specific items in the Statement of the Case and any prior Supplemental Statements of the Case. The Board will construe such arguments in a liberal manner for purposes of determining whether they raise issues on appeal, but the Board may dismiss any appeal which fails to allege specific error of fact or law in the determination, or determinations, being appealed. The Board will not presume that an appellant agrees with any statement of fact contained in a Statement of the Case or a Supplemental Statement of the Case which is not specifically contested. Proper completion and filing of a Substantive Appeal are the last actions the appellant needs to take to perfect an appeal.

11. 38 C.F.R. 20.800 provides:

Rule 800. Submission of additional evidence after initiation of appeal.

Subject to the limitations set forth in Rule 1304 (§20.1304 of this part), an appellant may submit additional evidence, or information as to the availability of additional evidence, after initiating an appeal. The provisions of this section do not apply in proceedings before the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness.

12. 38 C.F.R. 20.1304 provides in pertinent part:

Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.

(a) *Request for a change in representation, request for a personal hearing, or submission of additional evidence within 90 days following notification of certification and transfer of records.* An appellant and his or her representative, if any, will be granted a period of 90 days following the mailing of notice to them that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board, or until the date the appellate decision is promulgated by the Board of Veterans' Appeals, whichever comes first, during which they may submit a request for a personal hearing,

additional evidence, or a request for a change in representation. Any such request or additional evidence must be submitted directly to the Board and not to the agency of original jurisdiction. The date of mailing of the letter of notification will be presumed to be the same as the date of that letter for purposes of determining whether the request was timely made or the evidence was timely submitted. Any evidence which is submitted at a hearing on appeal which was requested during such period will be considered to have been received during such period, even though the hearing may be held following the expiration of the period. Any pertinent evidence submitted by the appellant or representative is subject to the requirements of paragraph (d) of this section if a simultaneously contested claim is involved.

(b) *Subsequent request for a change in representation, request for a personal hearing, or submission of additional evidence*—(1) *General rule*. Subject to the exception in paragraph (b)(2) of this section, following the expiration of the period described in paragraph (a) of this section, the Board of Veterans' Appeals will not accept a request for a change in representation, a request for a personal hearing, or additional evidence except when the appellant demonstrates on motion that there was good cause for the delay. Examples of good cause include, but are not limited to, illness of the appellant or the representative which precluded action during the period; death of an individual representative; illness or incapacity of an individual representative which renders it impractical for an appellant to continue with him or her as repre-

sentative; withdrawal of an individual representative; the discovery of evidence that was not available prior to the expiration of the period; and delay in transfer of the appellate record to the Board which precluded timely action with respect to these matters. Such motions must be in writing and must include the name of the veteran; the name of the claimant or appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable Department of Veterans Affairs file number; and an explanation of why the request for a change in representation, the request for a personal hearing, or the submission of additional evidence could not be accomplished in a timely manner. Such motions must be filed at the following address: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Depending upon the ruling on the motion, action will be taken as follows:

(i) *Good cause not shown.* If good cause is not shown, the request for a change in representation, the request for a personal hearing, or the additional evidence submitted will be referred to the agency of original jurisdiction upon completion of the Board's action on the pending appeal without action by the Board concerning the request or additional evidence. Any personal hearing granted as a result of a request so referred or any additional evidence so referred may be treated by that agency as the basis for a reopened claim, if appropriate. If the Board denied a benefit sought in the pending appeal and any evidence so

referred which was received prior to the date of the Board's decision, or testimony presented at a hearing resulting from a request for a hearing so referred, together with the evidence already of record, is subsequently found to be the basis of an allowance of that benefit, the effective date of the award will be the same as if the benefit had been granted by the Board as a result of the appeal which was pending at the time that the hearing request or additional evidence was received.

(ii) *Good cause shown.* If good cause is shown, the request for a change in representation or for a personal hearing will be honored. Any pertinent evidence submitted by the appellant or representative will be accepted, subject to the requirements of paragraph (d) of this section if a simultaneously contested claim is involved.

(2) *Exception.* The motion described in paragraph (b)(1) of this section is not required to submit evidence in response to a notice described in §20.903 of this chapter.

(c) *Consideration of additional evidence by the Board or by the agency of original jurisdiction.* Any pertinent evidence submitted by the appellant or representative which is accepted by the Board under the provisions of this section, or is submitted by the appellant or representative in response to a §20.903 of this part, notification, as well as any such evidence referred to the Board by the agency of original jurisdiction under §19.37(b) of this chapter, must be referred to the agency of original jurisdiction for review, unless

this procedural right is waived by the appellant or representative, or unless the Board determines that the benefit or benefits to which the evidence relates may be fully allowed on appeal without such referral. Such a waiver must be in writing or, if a hearing on appeal is conducted, the waiver must be formally and clearly entered on the record orally at the time of the hearing. Evidence is not pertinent if it does not relate to or have a bearing on the appellate issue or issues.

* * * * *