No. 11-773

In the Supreme Court of the United States

LIONEL GUERRA, 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 a veteran is entitled to special monthly compensation under 38 U.S.C. 1114(s) if he suffers from several service-connected disabilities that, taken together, result in a 100% disability rating, even though no single disability has a 100% rating.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 642 F.3d 1046. The opinion of the United States Court of Appeals for Veterans Claims (Pet. App. 22a-27a) is unreported. The decision of the Board of Veterans' Appeals (Pet. App. 29a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2011. A petition for rehearing was denied on September 20, 2011 (Pet. App. 46a-48a). The petition for a writ of certiorari was filed on December 19, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Veterans who suffer disabilities connected to their service are entitled to certain monetary benefits. As directed by statute, see 38 U.S.C. 1155, the Department of Veterans Affairs (VA) has promulgated a rating schedule that it uses to determine the severity of a disability, see 38 C.F.R. 4.1. Disabilities are rated in increments of ten percent ranging from zero percent (no disability) to 100% (total disability), and the corresponding rates of benefits are specified by statute. See 38 U.S.C. 1114(a)-(j) (Supp. IV 2010). If a veteran has more than one disabling condition, the VA rates each condition independently and then applies a table set out in regulations to arrive at a combined disability rating. See 38 C.F.R. 4.25.

In addition to ordinary disability benefits, some severely disabled veterans are entitled to special monthly compensation. As relevant here, 38 U.S.C. 1114(s) (Supp. IV 2010) provides for additional compensation "[i]f the veteran has a service-connected disability rated as total, and (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, or, (2) by reason of such veteran's service-connected disability or disabilities, is permanently housebound." In a regulation adopted after notice-and-comment rulemaking, the VA has interpreted Section 1114(s) to make special compensation available only "where the veteran has a single service-connected disability rated as 100 percent." 38 C.F.R. 3.350(i).

2. During petitioner's service in the United States Marine Corps, he suffered several service-related injuries. Pet. App. 4a. A VA regional office awarded him service-connected disability compensation for those injuries based upon the following disability ratings: 70% for

an upper-extremity gunshot wound, 70% for post-traumatic stress disorder, 40% for injuries to his left leg and thigh, 40% for injuries to his right leg and thigh, and 30% for neuropathy. *Ibid*. Though none of the individual disabilities is rated 100% disabling, under the combined-ratings table, they combine to a 100% rating. *Id.* at 4a-5a.

Petitioner requested special monthly compensation under Section 1114(s). After the regional office denied the claim, petitioner sought review from the Board of Veterans' Appeals (Board). Pet. App. 30a. The Board found that petitioner "has a combined 100 percent disability evaluation; however, he does not have one single disability rated at 100 percent." *Id.* at 44a. Applying 38 C.F.R. 3.350(i), the Board concluded that petitioner was not entitled to special monthly compensation under Section 1114(s). Pet. App. 44a.

3. The United States Court of Appeals for Veterans Claims affirmed. Pet. App. 22a-27a. Relying on its earlier decision in *Bradley* v. *Peake*, 22 Vet. App. 280, 289-291 (2008), the court held that, in order to qualify for benefits under Section 1114(s), a veteran must have a single disability rated at 100%. Pet. App. 26a.

4. The court of appeals affirmed. Pet. App. 1a-20a.

a. The court of appeals noted that, among the seven provisions of Section 1114 that establish criteria for special monthly compensation, "the use of the singular indefinite article in referring to a disability ('a service-connected disability') is unique to subsection (s)." Pet. App. 6a. The court further observed that, "[e]ven within subsection (s), the statute distinguishes between a single 'disability' and multiple 'disabilities.'" *Id.* at 7a. The court found that language to be "a strong indication that Congress's use of the singular and plural terms was pur-

poseful and that the reference to 'a service-connected disability rated as total' was meant to refer to a single disability with a 100% rating." *Ibid.*

Based on that analysis, the court of appeals concluded that "the statutory text evidences Congress's intent to limit the payment of special monthly compensation under subsection 1114(s) to a veteran who has at least one condition that has been rated as totally disabling." Pet. App. 7a. The court stated that "the language of subsection 1114(s) is not entirely free from ambiguity." The court therefore "defer[red] to the [VA's] interpretation of subsection 1114(s)" as set out in 38 C.F.R. 3.350(i), a regulation "entitled to deference under the principles of" *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). Pet. App. 7a-8a.

b. Judge Gajarsa dissented. Pet. App. 14a-20a. He concluded that in deferring to the VA's regulation, the majority had "ignore[d] the canon of statutory construction that requires ambiguities, if any, in veterans' statutes to be resolved in favor of the veteran." *Id.* at 14a-15a (citing *Brown* v. *Gardner*, 513 U.S. 115, 117-118 (1994)).

ARGUMENT

Petitioner argues (Pet. 8-20) that he is entitled to special monthly compensation under 38 U.S.C. 1114(s) because he suffers from several service-connected disabilities that, taken together, result in a 100% disability rating. The court of appeals correctly rejected that contention. As the court explained, petitioner's argument is contrary to the statutory text, and "any latent ambiguity in the statutory language" is resolved by a VA regulation that is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 8a.

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

1. Section 1114(s) provides for special monthly compensation for any veteran who has "a service-connected disability rated as total," assuming that certain other conditions are met. 38 U.S.C. 1114(s) (Supp. IV 2010). The indefinite article "a" is "used as a function word before most singular nouns" to indicate that "the *individual* in question is undetermined, unidentified, or unspecified." *Webster's Third New International Dictionary of the English Language* 1 (1993) (emphasis added). Thus, the most natural reading of the statutory language is that it applies only to a veteran who has a single service-connected disability with a total-disability rating.

Although 1 U.S.C. 1 provides that "words importing the singular include and apply to several persons, parties, or things," that rule of construction is inapplicable when "the context indicates otherwise." As the court of appeals observed, the structure of Section 1114 provides such a contrary indication here. Pet. App. 6a-7a. Of the seven provisions pertaining to special monthly compensation, only Subsection (s) uses the article "a" in referring to a disability. And even within Subsection (s), Congress distinguished between "a * * * disability" and multiple "disabilities." See 38 U.S.C. 1114(s)(1) (Supp. IV 2010) (referring to a veteran who "has additional service-connected disability or disabilities independently ratable at 60 percent or more"); 38 U.S.C. 1114(s)(2) (Supp. IV 2010) (referring to a veteran who, "by reason of such veteran's service-connected disability or disabilities, is permanently housebound").

Although the language of Subsections (s)(1) and (s)(2) encompasses situations in which multiple disabilities taken together produce the specified result, Subsection (s) itself refers solely to "a service-connected disability," not to a "disability or disabilities." "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 688 (2012) (internal quotation marks omitted). Applying that principle, the court of appeals correctly determined "that Congress's use of the singular and plural terms was purposeful and that the reference to 'a service-connected disability rated as total' was meant to refer to a single disability with a 100% rating." Pet. App. 7a.

Petitioner asserts (Pet. 16-17) that the court of appeals' interpretation of the statute is inconsistent with Section 1114(j), which specifies the monthly benefits for a veteran with a service-connected "total disability." For purposes of that provision, a veteran may be totally disabled on the basis of a combined rating for several disabilities, none of which by itself is totally disabling. Contrary to petitioner's suggestion (Pet. 17), however, the court's interpretation does not involve "different interpretations of 'total disability' in two sections of the same statute." Petitioner's claim for additional compensation fails not because his combined disability is less than "total," but because he does not have "*a* * * * disability rated as total." 38 U.S.C. 1114(s) (Supp. IV 2010) (emphasis added).

2. Petitioner devotes little attention to the specific issue of statutory interpretation involved in this case,

instead focusing (Pet. 8-9) on the abstract question "[w]hether deference under *Chevron* operates independently from, in conjunction with, or supersedes the pro-veteran canon of construction." Even if that question otherwise warranted this Court's review, this case would be an unsuitable vehicle for considering it because the decision of the court of appeals is supported by the unambiguous language of the pertinent statutory provision. Although the court of appeals stated that "the language of subsection 1114(s) is not entirely free from ambiguity," it did not explain how a contrary interpretation could be reconciled with the statutory text. Pet. App. 7a.

In any event, to the extent the statute is ambiguous, the court of appeals correctly applied this Court's decision in *Chevron*, which makes clear that when "Congress has not directly addressed the precise question at issue," then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. *Chevron* instructs courts to give "controlling weight [to agency regulations] unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. Under that standard, the court of appeals correctly deferred to the VA's interpretation set out in 38 C.F.R. 3.350(i). Pet. App. 8a-13a.

Petitioner asserts (Pet. 10, 14) that when resolving an ambiguity in a statute concerning veterans benefits, the VA must select an interpretation that favors veterans. Nothing in *Chevron* or in the governing statute supports that result. To the contrary, Congress has granted the Secretary of Veterans Affairs broad "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws adminis-

tered by the Department," without suggesting that the Secretary's discretion is narrower than that of any other agency head with authority to issue legislative rules. 38 U.S.C. 501(a); cf. *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002) (deferring to the Social Security Administration's interpretation of the statutory term "disability," based in part on the agency's expertise, the importance of the question to the administration of the statute, and the complexity of that administration). Under *Chevron*, the Secretary's resolution of statutory ambiguity therefore must be upheld unless it is "arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844. A VA regulation need not adopt the most pro-veteran approach that the statutory language will bear in order to survive review under that standard.

3. Petitioner relies (Pet. 10-15) on various cases in which this Court has stated that provisions granting benefits to veterans are to be liberally construed in the veterans' favor. Many of the cited cases, however, predated *Chevron* and did not involve administrative interpretations of a statute. See *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191 (1980); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946); *Boone* v. *Lightner*, 319 U.S. 561 (1943). And with one exception, the post-*Chevron* cases likewise did not involve agency regulations interpreting a statute. See *Henderson* v. *Shinseki*, 131 S. Ct. 1197 (2011); *Shinseki* v. *Sanders*, 556 U.S. 396 (2009); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991).

The exception is *Brown* v. *Gardner*, 513 U.S. 115 (1994), in which the Court considered the VA's regulation implementing 38 U.S.C. 1151, which requires the agency to compensate veterans for injury or aggravation of injury resulting from VA medical treatment. 513 U.S. at 116. Applying step one of the *Chevron* analysis, the

Court invalidated the regulation: "In sum, the text and reasonable inferences from it give a clear answer against the Government, and that, as we have said, is 'the end of the matter.'" *Id.* at 120 (quoting *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron*, 467 U.S. at 842)). Because the Court found no statutory ambiguity, it had no occasion to consider the appropriate role, if any, of a pro-veteran canon at step two of the *Chevron* analysis.

4. As petitioner acknowledges (Pet. 15-16), the decision below is consistent with other rulings in which the Federal Circuit has applied *Chevron* to VA regulations interpreting statutes providing for veterans benefits. See *Sears* v. *Principi*, 349 F.3d 1326, 1331-1332 (2003), cert. denied, 541 U.S. 960 (2004); accord *Haas* v. *Peake*, 544 F.3d 1306, 1308 (2008), cert. denied, 555 U.S. 1149 (2009); *Terry* v. *Principi*, 340 F.3d 1378, 1383 (2003), cert. denied, 541 U.S. 904 (2004); *Gallegos* v. *Principi*, 283 F.3d 1309, 1314, cert. denied, 537 U.S. 1071 (2002). This Court has repeatedly denied review in such cases, and there is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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