No. 13-1342

In the Supreme Court of the United States

BIRDEYE L. MIDDLETON, PETITIONER

v.

ROBERT A. MCDONALD,
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 court of appeals correctly affirmed the decision of the Court of Appeals for Veterans Claims denying petitioner's claim that his diabetes mellitus warranted a 40 percent rating under 38 C.F.R. 4.119, Diagnostic Code 7913, when petitioner did not require insulin, which was a necessary element for that rating.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 727 F.3d 1172. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 19a-24a) is not reported. The opinion of the Board of Veterans' Appeals (Pet. App. 25a-39a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2013. A petition for rehearing was denied on February 3, 2014 (Pet. App. 40a-46a). The petition for a writ of certiorari was filed on May 5, 2014 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Veterans who suffer disabilities connected to their military 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. By statute, disabilities must be graded in ten percent increments ranging from ten percent (some evidence of disability) to 100 percent (total disability). 38 U.S.C. 1155. These ratings must be based "as far as practicable, upon the average impairments of earning capacity resulting" from the disability. *Ibid.*; see 38 C.F.R. 4.1. In general, the regulations provide a separate rating schedule and diagnostic code specific to a particular injury or disease. See 38 C.F.R. Pt. 4.

The diagnostic code related to diabetes mellitus is set forth at 38 C.F.R. 4.119, Diagnostic Code (DC) 7913. The code recognizes five successive levels of disability:

> Requiring more than one daily injection of insulin, restricted diet, and regulation of activities (avoidance of strenuous occupational and recreational activities) with episodes of ketoacidosis or hypoglycemic reactions requiring at least three hospitalizations per year or weekly visits to a diabetic care provider, plus either progressive loss of weight and strength or complications that would be compensable if separately evaluated.....100 [percent]
>
> Requiring insulin, restricted diet, and regulation of activities with episodes of ketoacidosis or hypoglycemic reactions requiring one or two hospitalizations per year or twice a month visits to a diabetic

> care provider, plus complications that would not be compensable if separately evaluated…..60 [percent]
>
> Requiring insulin, restricted diet, and regulation of activities……..40 [percent]
>
> Requiring insulin and restricted diet, or; oral hypoglycemic agent and restricted diet….20 [percent]
>
> Manageable by restricted diet only……10 [percent]

Ibid.

In addition to establishing the requirements for particular conditions, the regulations provide additional guidance in choosing among rating levels. For example, the regulations state:

> Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the [veteran's] disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned.

38 C.F.R. 4.7. The regulations further provide that any "reasonable doubt * * * regarding the degree of disability" should be resolved in the veteran's favor. 38 C.F.R. 4.3.

Section 4.21, entitled "Application of rating schedule," provides:

> In view of the number of atypical instances it is not expected, especially with the more fully described grades of disabilities, that all cases will show all the findings specified. Findings sufficiently characteristic to identify the disease and the disability therefrom, and above all, coordination of rating with impairment of function will, however, be expected in all instances.

38 C.F.R. 4.21.

2. Petitioner is a veteran who served on active duty from 1964 until 1990. In 2001, he sought compensation for his type II diabetes mellitus. For that condition, petitioner used oral hypoglycemic agents and daily injections of the drug Byetta. A VA Regional Office granted him service connection at a 20 percent rating, pursuant to 38 C.F.R. 4.119, DC 7913. In 2008, petitioner sought an increased rating for his diabetes. After the VA conducted two physical examinations, the Board of Veterans' Appeals (Board) maintained the 20 percent rating. Pet. App. 2a.

The Board found that a 20 percent rating was appropriate because petitioner used oral hypoglycemic medication and followed a restricted diet. Pet. App. 32a-33a; see 38 C.F.R. 4.119. The Board determined that the next highest level, a 40 percent rating, was not appropriate because petitioner did not use insulin to regulate his diabetes. The Board explained: "The fact that the Veteran's diabetes d[id] not require the use of insulin ultimately precludes his being awarded a rating in excess of 20 percent" because "[u]se of insulin is a necessary element for the 40 percent rating." Pet. App. 33a.

The Board recognized that petitioner used Byetta to control his diabetes. Pet. App. 33a. The Board observed, however, that "while Byetta is a medication used to control diabetes, it is not insulin." *Ibid.* The Board declined to apply an "extraschedular rating" to petitioner's condition, see *Thun* v. *Peake*, 22 Vet. App. 111, 114-115 (2008), because it found that "the applicable rating criteria are adequate to evaluate the Veteran's disability," Pet. App. 34a-35a.

Petitioner appealed the Board's decision to the Court of Appeals for Veterans Claims (CAVC). Petitioner argued that the Board had erred by treating insulin as a necessary element for the 40 percent rating and by declining to assign him that rating.[1] See Pet. App. 24a; Pet. CAVC Br. 5-15. Petitioner argued that, because he was required to regulate his activities and to take Byetta injections, his condition was more closely analogous to the 40 percent rating, and that the Board therefore should have applied 38 C.F.R. 4.7 and 38 C.F.R. 4.20 to rate him at the higher level. Pet App. 24a; Pet. CAVC Br. 7, 13, 15.[2]

The CAVC rejected those arguments and affirmed the Board's decision. Pet. App. 19a-24a. The court explained that "the plain language of the regulation states 'insulin,' and does not include a supposed substitute," such as Byetta. *Id.* at 21a. The court further held (*id.* at 24a) that petitioner's reliance on 38 C.F.R. 4.7 was foreclosed by its decision in *Camacho* v. *Nicholson*, 21 Vet. App. 360, 367 (2007), which held that a claimant with diabetes mellitus could not be rated 40 percent disabled if he satisfied only two of the three criteria for that rating. The CAVC also found 38 C.F.R. 4.20 inapplicable because that provision is "utilized to rate an unlisted condition," and "diabetes

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[1] Petitioner also argued that the Board had committed clear error by not crediting evidence that he was in fact prescribed insulin. Pet. CAVC Br. 8-10. The CAVC rejected that argument, concluding that the record supported the Board's factual finding that petitioner had not been prescribed insulin. Pet. App. 21a-24a.

[2] 38 C.F.R. 4.20, entitled "Analogous ratings," provides that "[w]hen an unlisted condition is encountered it will be permissible to rate under a closely related disease or injury" by analogy to the functions affected, anatomy, and symptoms.

[wa]s clearly a listed condition under the rating schedule." Pet. App. 24a.

3. The court of appeals affirmed. Pet. App. 1a-18a.

a. The court of appeals emphasized its limited authority to review decisions of the CAVC. See 38 U.S.C. 7292. The court explained that it was authorized to "determine the proper interpretation of a regulation such as DC 7913," but that it lacked authority to review the CAVC's factual determinations or its application of law to facts. Pet App. 4a; see 38 U.S.C. 7292(d)(2).[3]

The court of appeals affirmed the CAVC's finding that DC 7913's 40 percent rating requires that the petitioner take insulin, and not a substitute such as Byetta. Pet. App. 6a-8a. Like the Board and the CAVC, the Federal Circuit relied on "the plain language" of DC 7913, which reserves the 40 percent rating for those circumstances "[r]equiring insulin, restricted diet, and regulation of activities." *Id.* at 7a (brackets in original) (quoting 38 C.F.R. 4.119, DC 7913).

The court of appeals described the diabetes rating scheme as a "structured scheme of specific, successive, cumulative criteria," under which "each higher rating includes the same criteria as the lower rating plus distinct new criteria." Pet. App. 11a. The court agreed with the VA's position that the "use of the conjunctive 'and' in the 40% rating of DC 7913" requires a veteran "to demonstrate all of the required elements"—use of insulin, restricted diet, and regula-

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[3] The Federal Circuit may "set aside any regulation or any interpretation thereof" where the decision of the CAVC is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. 7292(d)(1)(A).

tion of activities—"in order to be entitled to that higher evaluation." *Id.* at 11a-12a. The court rejected petitioner's argument that the rating schedule was obsolete because it predated Byetta's introduction as a diabetes treatment. The court explained that, if "those regulatory provisions are obsolete, then it is not for us to rewrite them." *Id.* at 7a.

The Federal Circuit also agreed with the CAVC that 38 C.F.R. 4.7 is inapplicable to this case. Pet. App. 8a-12a. The court explained that Section 4.7 applies only "[w]here there is a question as to which of two evaluations shall be applied." *Id.* at 10a (citation omitted). Because petitioner "did not meet the '[r]equiring insulin' criterion of the 40% rating," *ibid.* (brackets original), the court found that there was "no question that the higher evaluation did not apply" in this case, *id.* at 12a.

b. Judge Plager dissented. Pet. App. 13a-18a. He argued that the court of appeals had erred by strictly adhering to the "verbal statements in th[e] ratings schedule," rather than requiring the Board to apply 38 C.F.R. 4.7 to determine whether petitioner's disability "more nearly approximates the criteria for the higher rating." Pet. App. 16a-17a. Judge Plager characterized the rating schedule as "only guides" that should "respond to a commonsense analysis reflecting the illness and its treatment." *Id.* at 16a.

4. Petitioner filed a petition for panel rehearing and rehearing en banc, which was denied. Pet. App. 40a-41a. Judge Newman, joined by Judge Wallach, dissented from the denial of rehearing en banc. *Id.* at 40a, 42a-45a. Judge Plager dissented from the denial of panel rehearing. *Id.* at 46a.

ARGUMENT

The court of appeals correctly held that petitioner's diabetes did not qualify for a 40 percent rating because petitioner does not require insulin. That case-specific ruling is narrow and does not conflict with applicable VA regulations or with any decision of this Court or another court of appeals. Further review is not warranted.

1. The Board, the CAVC, and the Federal Circuit all construed the diabetes rating schedule, 38 C.F.R. 4.119, DC 7913, to make the direct administration of insulin a mandatory requirement for a veteran to qualify for a 40 percent disability rating. The plain language of the ratings schedule confirms that interpretation. Under DC 7913, the 40 percent rating is applicable to veterans with diabetes mellitus who "requir[e] insulin, restricted diet, and regulation of activities." See p. 3, *supra*. Diagnostic Code 7913 thus references only the administration of insulin, not a substitute, as a prerequisite for a 40 percent rating. See Pet App. 7a-8a. The plain terms of DC 7913 also require a claimant to meet all three listed criteria to qualify for the 40 percent rating level. See *id.* at 11a-12a.

The Federal Circuit correctly held that this interpretation was supported not only by the "plain language" of the 40 percent rating provision, but also by the context and structure of the diabetes rating schedule as a whole. The court observed, for example, that the 20 percent rating level for 38 C.F.R. 4.119, DC 7913 recognizes alternatives to insulin, including oral hypoglycemic agents, demonstrating that "when the VA intended to specify treatment for diabetes with another substance, it identified such treatment direct-

ly." Pet. App. 7a. The VA's failure to provide an alternative to insulin in the 40 percent rating indicates that no alternative medication would suffice.

The "successive and cumulative" structure of DC 7913 reinforces the conclusion that each of the 40 percent rating's three criteria must be satisfied. Pet. App. 9a. The Federal Circuit examined the rating categories in DC 7913 and found that "each higher rating includes the same criteria as the lower rating plus distinct new criteria." *Id.* at 11a. The court found that this "successive and cumulative" feature distinguished DC 7913 from other rating schedules. *Id.* at 9a-11a (distinguishing *Tatum* v. *Shinseki*, 23 Vet. App. 152, 155-156 (2009), which construed the hypothyroidism ratings).

2. The same findings supported the conclusion of the Federal Circuit, the CAVC, and the Board that 38 C.F.R. 4.7 is inapplicable to this case because petitioner lacked a necessary element (insulin use) that is required for the 40 percent rating. As the court of appeals explained, "the plain language of [Section] 4.7 provides that the higher of two evaluations will be assigned only '[w]here there is a question as to which of two evaluations shall be applied.'" Pet. App. 10a (brackets in original) (quoting 38 C.F.R. 4.7). The court correctly held that "there is no question as to which evaluation shall be applied," and Section 4.7 therefore is not implicated, "when a veteran does not satisfy all of the required criteria of the higher rating but does satisfy all of the criteria of the lower rating." *Ibid.*

Petitioner contends (Pet. 23) that, by declining to apply 38 C.F.R. 4.7 to his case, the Federal Circuit announced a broad "new rule" that "fundamentally

changes the nature of the disability evaluation process for veterans." He further argues (*ibid.*) that, under the court of appeals' interpretation of DC 7913 and Section 4.7, "any diagnostic code using a conjunctive 'and' to join rating criteria will become a rigorous checklist depriving veterans of the flexibility intentionally built into the Rating Schedule."[4] That criticism is misconceived.

The court of appeals correctly explained that 38 C.F.R. 4.7 is inapplicable by its terms unless "there is a question as to which of two evaluations shall be applied." Pet. App. 10a (citation omitted). Petitioner does not dispute that, if the applicable rating schedule unambiguously dictates a particular rating in a particular case—as the Board, the CAVC, and the Federal Circuit found was true here—Section 4.7 does not apply. The court of appeals thus did not establish a "new rule" (Pet. 23) when it found Section 4.7 inapplicable to this case. Rather, petitioner's real dispute is with the Federal Circuit's narrow holding that insulin use is a mandatory condition of the 40 percent rating under DC 7913. That holding is supported by the plain language of DC 7913, and it raises no legal issue of broad importance warranting this Court's review.

Petitioner also argued in the Federal Circuit that the diabetes rating schedule is outdated because it does not recognize Byetta as an insulin substitute.[5]

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[4] Petitioner also suggests that the Federal Circuit relied on "a crucially misquoted version" of Section 4.7. Pet. 17. Petitioner does not explain, however, how the court's omission of the word "required" from its quotation of the regulation materially affected the court's legal analysis.

[5] Before the Board, petitioner provided no substantial support for his assertion that Byetta is equivalent to insulin. Pet. App. 25a-

The court of appeals correctly observed that it lacked authority to ignore or rewrite the applicable regulation. Pet. App. 7a.[6] Evidence concerning new innovations in treatment might appropriately be submitted to the VA in support of a request to amend the existing rating schedules. Evidence suggesting a therapeutic equivalence between insulin and Byetta, however, would not render the term "insulin" ambiguous as it appears in DC 7913.

3. Petitioner asserts (Pet. 14) that the Federal Circuit's decision is inconsistent with 38 C.F.R. 4.21, another regulation that provides general guidance in the application of the rating schedule.[7] That provision states in full:

> In view of the number of atypical instances it is not expected, especially with the more fully described grades of disabilities, that all cases will show all the

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35a. Petitioner attempted to supplement the record before the CAVC, but the CAVC declined to consider the new information because it was outside the Board record. *Id.* at 21a n.1. Although petitioner argues (Pet. 24-25) that "many rating criteria" are "out of date," no record evidence establishes that Byetta is in fact equivalent to insulin.

[6] In addition to the established rule that courts generally may not rewrite agency regulations, specific statutes preclude the CAVC and the Federal Circuit from reviewing "the schedule of ratings for disabilities" established by the VA. 38 U.S.C. 7252(b); see 38 U.S.C. 7292(a) (specifying that the Federal Circuit lacks jurisdiction to review the CAVC's refusal to review the ratings schedule).

[7] Petitioner relied upon 38 C.F.R. 4.20 before the CAVC. See Pet. CAVC Br. 13-14. He first raised 38 C.F.R. 4.21 in his Federal Circuit brief (Pet. C.A. Br. 30), where he asserted, without citation to any source, that the "entire framework of the rating schedule is premised upon the recognition" in 38 C.F.R. 4.21 that not "all cases will show all the findings specified."

> findings specified. Findings sufficiently characteristic to identify the disease and the disability therefrom, and above all, coordination of rating with impairment of function will, however, be expected in all instances.

Ibid.

Section 4.21 does not provide a broad license to ignore the requirements for specific conditions and rating levels. Although petitioner contends that the Federal Circuit erred in "essentially ignoring" Section 4.21 (Pet. 17), it is not clear how petitioner believes the court should properly have taken that provision into account. The regulation's observation that not "all cases will show all the findings specified" does not excuse veterans from complying with all the required criteria for different conditions.[8]

For similar reasons, petitioner's reliance on pro-veteran canons of statutory construction, as well as on general provisions mandating that veterans should receive the benefit of any reasonable doubt, is likewise misplaced. See Pet. 17 (citing 38 C.F.R. 4.3, and *Hen-*

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[8] Nor does the court of appeals' decision conflict with any relevant guidance issued by the VA. Petitioner quotes a single sentence culled from comments made by the VA in 1996 in promulgating a final rating schedule for endocrine disabilities. See Pet. 18. But the VA's recognition that "those evaluating disabilities always have the task of assessing which evaluation level best represents the overall picture," *ibid.* (quoting 61 Fed. Reg. 20,440 (May 7, 1996)), is not inconsistent with the Federal Circuit's ruling in this case. As the sentence preceding the one quoted by petitioner explains, "providing clear and objective criteria is the best way to assure that disabilities will be evaluated fairly and consistently." 61 Fed. Reg. at 20,440. In this case, the Federal Circuit correctly held that adherence to the "clear and objective criteria" in DC 7913 was the proper way to evaluate petitioner's disability level.

derson v. *Shinseki*, 131 S. Ct. 1197, 1206 (2011)). Those canons and presumptions apply only where there is doubt about the proper interpretation of applicable provisions. As explained above (see pp. 5, 7, *supra*), the Board, the CAVC, and the Federal Circuit all found the diabetes rating regulations unambiguous as applied to petitioner's case.

4. Petitioner suggests (Pet. 16-17) that the Federal Circuit's decision is at odds with the decision of the "much-more-experienced [CAVC]" in *Tatum* v. *Shinseki*, *supra*. This claim of conflict between the Federal Circuit and an administrative court under its supervision provides even less basis for review by this Court than an intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioner's invocation of the CAVC's specialized expertise is particularly misplaced here, since the CAVC *rejected* petitioner's claim of entitlement to a 40 percent rating. See Pet. App. 19a-24a. In any event, the Federal Circuit's decision in this case does not conflict with *Tatum*.

In *Tatum*, the CAVC addressed the diagnostic code for hypothyroidism, DC 7903. The CAVC distinguished its prior decision in *Camacho* v. *Nicholson*, 21 Vet. App. 360 (2007), which had interpreted DC 7913 (the same diabetes rating schedule at issue here).[9] The CAVC in *Tatum* observed that, unlike the diabetes schedule, the hypothyroidism schedule, 38 C.F.R. 4.119, DC 7903, "does not involve successive rating

[9] Consistent with the holdings below, the CAVC in *Camacho* held that, given the "clearly conjunctive structure" of the 40 percent rating in DC 7913, a claimant whose condition satisfied only two of the three required elements was ineligible for the 40 percent rating. 21 Vet. App. at 366-367.

criteria." 23 Vet. App. at 156. Based on that distinction, the CAVC in *Tatum* found that the Board should have applied 38 C.F.R. 4.7 to evaluate the claimant's hypothyroidism because "the criteria [in DC 7903] for higher disability ratings are variable, and not simply cumulative." 23 Vet. App. at 156. The Federal Circuit's analysis in this case is fully consistent with that decision. See Pet. App. 10a-11a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2014