No. 02-155

In the Supreme Court of the United States

RAYMOND GALLEGOS, PETITIONER

v.

ANTHONY J. PRINCIPI,
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

Section 7105 of Title 38 provides that a claimant dissatisfied with a Department of Veterans Affairs benefits determination may initiate appellate review by filing a "notice of disagreement." The question presented is whether the court of appeals correctly held that 38 C.F.R. 20.201, which states that a notice of disagreement "must be in terms which can be reasonably construed as disagreement with that determination and a desire for appellate review," is a permissible construction of Section 7105.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (Pet. App. 1-22) is reported at 283 F.3d 1309. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 24-49) is reported at 14 Vet. App. 50. The opinion of the Board of Veterans' Appeals is unreported.

JURISDICTION

The judgment of the court of appeals was filed on March 14, 2002. A petition for rehearing was denied on June 7, 2002. The petition for a writ of certiorari was filed on July 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1993, petitioner filed a claim with the Department of Veterans Affairs (VA) for compensation

for post-traumatic stress disorder stemming from his military service. Pet. App. 25. The VA regional office denied that claim in September 1994. *Ibid.* On October 11, 1994, petitioner's representative, the Disabled American Veterans, submitted a letter to the VA entitled "Memo to Rating Board." The letter stated, in relevant part: "[I]t is our opinion that denial of the veteran's claim for [post-traumatic stress disorder] was a little bit premature. Further development * * * would prove beneficial to fair evaluation of this veteran's claim." *Id.* at 25-26.*

Petitioner took no further action until February 20, 1997, when he filed an application to reopen the disallowed claim. The regional office granted the requested benefits in October 1997, assigning an effective date of February 20, 1997. Pet. App. 26. Petitioner filed a notice of disagreement (NOD) challenging the effective date. *Ibid.* In petitioner's view, the benefits award should have taken effect on August 31, 1993, the date on which he filed his original claim. *Ibid.*

2. Petitioner appealed the regional office's decision to the Board of Veterans' Appeals (Board), which concluded that he was not entitled to an earlier effective date. Pet. App. 26. The Board reasoned that, while petitioner's October 1994 letter to the regional office could be understood as disagreeing with the denial of his original claim in September 1994, it could not "be reasonably construed to indicate the appellant's desire for appellate review." *Id.* at 27. Thus, the October 1994 letter did not constitute a valid NOD under 38 C.F.R. 20.201, which states that, "[w]hile special wording is not required, the Notice of Disagreement must be in terms

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* The record does not indicate what action, if any, the VA took in response to the letter. See Pet. App. 27.

which can be reasonably construed as disagreement with [the decision in question] and a desire for appellate review." *Ibid.* Since petitioner never filed an NOD challenging the September 1994 denial of his original claim, that denial had become final, and the earliest possible effective date for the benefits award was February 20, 1997—the date of petitioner's application to reopen the disallowed claim. See 38 U.S.C. 5110(a) (stating that "the effective date of an award based on * * * a claim reopened after final adjudication * * * shall not be earlier than the date of receipt of application therefor").

3. Petitioner appealed to the Court of Appeals for Veterans Claims (CAVC), which reversed the Board's decision and invalidated 38 C.F.R. 20.201 to the extent that it requires claimants to express a desire for appellate review when filing an NOD. Pet. App. 38-39. Under 38 U.S.C. 7105, the CAVC observed, an NOD must be (i) filed in writing, (ii) with the regional office, (iii) by the claimant or the claimant's authorized representative, (iv) within one year of the mailing of the regional office decision, and (v) must express disagreement with a specific determination by the regional office. Pet. App. 31. The CAVC determined that Section 7105 is clear and complete, leaving no "gap" for the VA to fill by regulation. *Id.* at 32, 35.

The CAVC found further support for that conclusion in the structure of Section 7105, under which an NOD serves only to "*initiate*[] appellate review." Pet. App. 32. By filing an NOD, a claimant signifies his desire for "review and development" by the regional office, *id.* at 34, which must issue a "statement of the case" explaining the reasons for its decision and the evidence and legal authority on which it relied, 38 U.S.C. 7105(d)(1)-(2). If the claimant still is dissatisfied after

receiving the statement of the case, "he or she *then* may pursue an appeal to the [Board] by filing a Substantive Appeal, and only then does the case go forward to the Board for its review." Pet. App. 34 (emphasis omitted). Thus, appellate review by the Board does not follow inevitably from the filing of an NOD, but occurs only if the claimant is unpersuaded by the statement of the case. The CAVC concluded that "it cannot be reasonable" for the VA to require claimants to express a desire for Board review at the time of filing an NOD when "it is quite possible that it may not become necessary to transmit the case to the [Board]." *Id.* at 34-35.

Finally, the CAVC emphasized that Congress deliberately designed the VA adjudication system "to be pro-claimant." Pet. App. 35. As such, any ambiguity in Section 7105 must be resolved in the veteran's favor. *Id.* at 36 (citing *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)). In light of the "remedial nature of the [Veterans Judicial Review Act] in providing judicial review to veterans and other VA claimants," *ibid.*, the CAVC could find "no basis for affording the [VA] even the slightest latitude to make it more difficult for a claimant to file an NOD," *id.* at 37. It reversed the Board's decision and remanded the matter for further adjudication as to the effective date of the October 1997 benefits award.

4. The Secretary of Veterans Affairs appealed to the United States Court of Appeals for the Federal Circuit, which again reversed. The court of appeals rejected the CAVC's conclusion that Section 7105 requires neither interpretation nor implementation by regulation. Pet. App. 7. It explained that, while the "statutory language supplies some requirements for a valid NOD," it does not "define 'notice of disagreement' or suggest sufficient expressions to make a writing an NOD."

Ibid. Nor does Section 7105 "suggest that its specifications for an NOD—writing, one-year time limit from notice, etc.—are the only requirements for a valid NOD." *Ibid.* "In sum," the court concluded, Section 7105 "does not *directly* address whether an NOD is sufficient without a request for appellate review. Therefore, under the standard set by the Supreme Court [in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 836 (1984)], title 38 contains 'a gap for an agency to fill' with regard to the definition of a legally valid NOD." *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

Turning to the structure and purpose of the statute, the court of appeals concluded that the VA regulation "is a reasonable and permissible construction of § 7105." Pet. App. 8. It reasoned that the requirement that an NOD express a desire for appellate review "serves administrative efficiency by distinguishing a request for Board review from other routine communications in the wake of a VA decision." *Ibid.* Moreover, "meeting the requirement of [38 C.F.R.] § 20.201 is not an onerous task" for a claimant who wishes to pursue appellate relief. *Ibid.* The court rejected petitioner's claim that "a veteran cannot make an informed decision to appeal" prior to receiving a statement of the case from the regional office (which occurs only after a valid NOD is filed). *Id.* at 8-9. "To the contrary," it explained, "the VA decision [by the regional office] itself provides the veteran with information for an informed appeal decision," since the required notice of that decision "must include a statement of reasons for the decision and a summary of the evidence considered by the VA." *Id.* at 9 (citing 38 U.S.C. 5104(b)).

The court of appeals held that the CAVC "erred in not applying *Chevron* deference to the VA's imple-

mentation of 38 U.S.C. § 7105." Pet. App. 10. It reversed and remanded the CAVC's decision "for a determination as to whether [petitioner's October 1994] letter constitutes a valid NOD under [38 C.F.R.] 20.201." *Ibid.*

Judge Gajarsa dissented. Pet. App. 11-22. He concluded that "[t]he plain meaning and structure of § 7105 leave no room for an agency to add additional requirements to a NOD." *Id.* at 12. In Judge Gajarsa's view, therefore, "the inquiry does not pass step one of the *Chevron* test." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or other courts of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 6-12) that the court of appeals erred in according *Chevron* deference to the VA's interpretation of "notice of disagreement" because Section 7105 leaves no gap for the agency to fill. He does not deny that the VA has "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws" it administers, 38 U.S.C. 501(a), or that such rulemaking authority extends to "the forms of application by claimants under [those] laws," 38 U.S.C. 501(a)(2), and "the manner and form of adjudications and awards," 38 U.S.C. 501(a)(4). Similarly, petitioner does not dispute that the VA's regulation must be analyzed under the principles set forth in *Chevron* and its progeny. Instead, he simply disagrees with how the court of appeals applied those settled legal principles to the particular regulation at issue. That claim does not warrant further review and, in any event, is without merit.

a. As the court of appeals explained (Pet. App. 7), Congress did not define the term "notice of disagreement" in Section 7105. Nor does that term have an obvious, common-sense meaning; to the contrary, it is a term of art peculiar to the field of veterans' benefits determinations. "[G]reat deference" is due an agency's interpretation of a term of art in its own area of expertise. *Ohio Power Co.* v. *FERC*, 744 F.2d 162, 167 n.4 (D.C. Cir. 1984) (noting "the great deference due the Federal Energy Regulatory Commission in identifying terms of art in the energy field"); *Illinois Terminal R.R.* v. *ICC*, 671 F.2d 1214, 1217 (8th Cir. 1982) (explaining that "'bridge toll' is a term of art in the railroad industry and, therefore, we give great deference to the ICC's interpretation").

Moreover, although Section 7105 specifies certain requirements for an NOD, nothing in the statute suggests that Congress intended that list of requirements to be exhaustive. As the court of appeals correctly concluded, Section 7105 is silent as to the "precise question at issue," *Chevron*, 467 U.S. at 843—whether an NOD should include an expression of desire for appellate review. Therefore, the operative question is "whether the agency's answer is based on a permissible construction of the statute." *Ibid.*

b. Petitioner maintains (Pet. 6, 8-10) that the structure of Section 7105 evinces a clear congressional intent to preclude any requirement that an NOD express a desire to seek appellate review. He emphasizes (Pet. 6) that an NOD is the first of a two-step process leading to review by the Board: The claimant first files an NOD with the regional office and then, after obtaining a "statement of the case," may file a "formal appeal" to the Board of Veterans' Appeals. 38 U.S.C. 7105(d). Since the immediate effect of an NOD is simply to

compel the regional office to issue a statement of the case, petitioner argues, "[i]t is clear * * * that Congress *only* asked that applicants express disagreement" in order to trigger that first step. Pet. 8.

That argument ignores Section 7105(a), which states explicitly that "[a]ppellate review will be initiated by a notice of disagreement." The fact that an NOD is not the last or only step in the appellate process is irrelevant. The key point—which petitioner does not dispute—is that an NOD is *a* part of that process. It is hardly unreasonable to require an applicant seeking to "initiate[]" "appellate review" to make that intention reasonably clear. 31 U.S.C. 7105(a). At the very least, nothing in the text of Section 7105 or the structure of the appellate review process suggests that Congress clearly intended to prohibit the VA from adopting such a rule. Therefore, the court of appeals was right to conclude that "*Chevron* deference applies to the VA's implementation of § 7105." Pet. App. 8.

2. The court of appeals also correctly concluded that the definition of "notice of disagreement" contained in 38 C.F.R. 20.201 is based on a permissible construction of Section 7105. Section 7105 is concerned entirely with administrative appeals to the Board. The term "notice of disagreement" is used "solely in the context of initiating an appeal to the Board. No other function of an NOD is mentioned." *Hamilton* v. *Brown*, 39 F.3d 1574, 1582 (Fed. Cir. 1994). And, as noted, Section 7105(a) states that appellate review of VA decisions is "initiated by a notice of disagreement." The VA's determination that an NOD should "be in terms which can reasonably be construed as * * * a desire for appellate review," 38 C.F.R. 20.201, is a consistent with those provisions.

a. Petitioner argues (Pet. 9-10) that it is "*patently unreasonable* and *manifestly contrary* to the statute to impose upon an appellant a requirement to express a 'desire for appellate review,' *before* an appellant has received a statement of [the] case" because, "more often than not," a claimant is not aware of the basis for the VA's denial of his claim until he receives the statement of the case. That is incorrect. In fact, Congress took pains to assure that veterans have sufficient information to make informed decisions with respect to appellate review before filing an NOD. As the court of appeals explained (Pet. App. 9), the VA is required by law to provide the claimant notice of any decision denying benefits. The claimant then has one year to file an NOD challenging that decision. 38 U.S.C. 7105(b). Under 38 U.S.C. 5104(b), the initial notice of decision must include a statement of the reasons for the VA's decision and a summary of the evidence it considered. Congress enacted Section 5104(b) to address concerns that, "'[l]acking such information, claimants for VA benefits very likely are impaired in making well-informed choices on whether to accept or appeal a VA decision.'" *Hayre* v. *West*, 188 F.3d 1327, 1334 (Fed. Cir. 1999) (quoting S. Rep. No. 126, 101st Cong., 1st Sess. 297 (1989)) (emphasis omitted). Of course, there would be no basis for such concerns if, as petitioner contends, Congress assumed that claimants would not decide whether to "appeal a VA decision" until after filing an NOD and receiving a statement of the case.

b. Petitioner also suggests (Pet. 7), again incorrectly, that 38 C.F.R. 20.201 changed the VA's prior interpretation of Section 7105. To the contrary, the VA regulations consistently have required that an NOD express a desire for appellate review. Congress created the appellate process articulated in Section 7105 in

1962. See generally Act of Sept. 19, 1962, Pub. L. No. 87-666, 76 Stat. 553 (enacting predecessor to Section 7105). The next year, the VA promulgated former 38 C.F.R. 19.1a(b), which stated that an NOD "should be in terms which can reasonably be construed as evidencing a desire for review of [the VA's] determination." 28 Fed. Reg. 35 (1963). Thus, for almost four decades, the VA has interpreted the term "notice of disagreement" to include some indication of a desire for review.

c. Finally, petitioner argues (Pet. 5) that the VA's definition of "notice of disagreement" creates an unnecessary barrier to appellate review and therefore contravenes the pro-claimant purpose of the statute. However, the regulation specifically states that "special wording is not required." 38 C.F.R. 20.201. It requires only that an NOD that serves to initiate the appellate review process contain language "which can be reasonably construed as * * * a desire for appellate review." *Ibid.* Moreover, the VA construes 38 C.F.R. 20.201 liberally in favor of triggering appeal rights. As it explained when the regulation was promulgated:

> VA has always been, and will continue to be, liberal in determining what constitutes a Notice of Disagreement. The continuation of this policy is demonstrated by the lack of a requirement for special wording and the use of the phrase "can be reasonably construed." Nevertheless, *some indication which reasonable persons can construe as disagreement with a determination by an agency of original jurisdiction and a desire to appeal that determination is at the very heart of what constitutes a Notice of Disagreement.* Without such an expression, the communication may be something, but it is not a Notice of Disagreement. *Not much is required, but*

> *the communication must be recognizable as a Notice of Disagreement.*

57 Fed. Reg. 4093 (1992) (emphasis added).

Thus, the regulation does not impose any arbitrary or technical requirements on veterans. Nor is it inconsistent with the claimant-friendly system of veterans benefits adjudications. As an agency of original jurisdiction, the VA "receives innumerable communications from claimants and the claimants' representatives." Pet. App. 42. It needs some way to identify those communications that were meant to trigger the elaborate appeals process described in Section 7105. Accordingly, the VA's regulations consistently have provided that, in order to be treated as an NOD, a writing must contain some language that reasonably can be construed as an expression of desire for appellate review. That minimal requirement, grounded in the VA's practical experience with administering the benefits adjudication system, is consistent with a statutory scheme under which an NOD serves to "initiate[]" the appeals process. 38 U.S.C. 7105(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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