No. 99-1191

In the Supreme Court of the United States

FRANK A. GLOVER, PETITIONER

v.

TOGO D. WEST, JR., 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

A Veterans Administration regulation provided for the reexamination of any veteran applying for disability benefits "whenever evidence indicates there has been a material increase in disability since the last examination, or where the disability is likely to improve materially in the future." 38 C.F.R. 3.327(a) (1979). The question presented is whether that reexamination requirement was triggered by the filing of an unsupported claim for an increased disability rating.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 185 F.3d 1328. The opinion of the United States Court of Appeals for Veterans Claims[1] (Pet. App. 11-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1999. A petition for rehearing was denied on October 19, 1999 (Pet. App. 20-21). The petition for a

[1] On March 1, 1999, the name of the United States Court of Veterans Appeals was changed to the United States Court of Appeals for Veterans Claims. See Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3341.

writ of certiorari was filed on January 18, 2000. The jurisdiction of this Court invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner served in the United States Navy from July 1940 to February 1945. Pet. App. 11. He was honorably discharged and awarded a 50% disability rating for psychoneurosis. *Id.* at 12. In 1951, following a series of rating decreases, the Department of Veterans Affairs (VA) reduced petitioner's disability evaluation to a non-compensable 0% rating, effective January 29, 1952. *Ibid.* That decision was based upon a medical examination that indicated that petitioner was "mentally alert [and] free of any delusions, hallucinations or ideas of reference." *Ibid.*

More than 25 years later, in August 1979, petitioner sought an increase in his disability rating. Pet. App. 12. Petitioner submitted a medical report diagnosing a gastrointestinal disorder and degenerative disc disease, but the report did not refer to any psychiatric condition. *Ibid.* The regional VA office denied petitioner an increased disability rating. *Ibid.* Petitioner did not appeal that decision. *Id.* at 12-13.

Thirteen years later, on December 9, 1992, petitioner again applied for an increased disability rating. Pet. App. 13. In support of his application, petitioner submitted a medical report from a physician who had been treating him for a psychiatric disorder. *Ibid.* That report, combined with mental examinations conducted by the VA, led the VA to grant petitioner a disability rating of 50% for service-connected anxiety reaction, major depression, and post-traumatic stress disorder. *Ibid.* The new rating was made retroactive to De-

cember 9, 1992, the date the agency received petitioner's application. *Ibid.*

Petitioner challenged that decision, arguing that in 1979 the VA had breached its duty under 38 U.S.C. 5107(a) to assist him by not having him examined by a psychiatrist before issuing its decision denying him benefits. Pet. App. 3, 13.[2] The Board of Veterans' Appeals (Board) rejected petitioner's contention, holding that the VA's failure to conduct a psychiatric examination did not constitute a clear and unmistakable error under 38 U.S.C. 5109A(a) (Supp. III 1997). Pet. App. 3.[3]

2. The Court of Appeals for Veterans Claims (CAVC) affirmed in part and vacated and remanded in part. Pet. App. 11-19. The CAVC held (*id.* at 16) that the VA was not obligated in 1979 to reexamine petitioner under 38 C.F.R. 3.327(a) (1998), which provides for a reexamination when "evidence indicates there has been a material change in a disability." The CAVC explained that petitioner "presented no evidence of a material change in his service-connected condition between his examination in 1951 and the one in 1979." Pet. App. 16. The court also found, however, that petitioner had submitted evidence in support of his 1992 application that could warrant an earlier effective date than December 9, 1992, the effective date assigned by the VA, and the CAVC accordingly remanded for the Board "to explain why an increase in [petitioner's]

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[2] 38 U.S.C. 5107(a) provides that "[t]he Secretary shall assist * * * a claimant in developing the facts pertinent to the claim."

[3] 38 U.S.C. 5109A(a) (Supp. III 1997) provides that "[a] decision by the Secretary * * * is subject to revision on the grounds of clear and unmistakable error."

condition could not be ascertained prior to the assigned effective date." *Id.* at 19.[4]

3. The court of appeals affirmed. Pet. App. 1-10. The court of appeals observed that 38 U.S.C. 7292 "highly circumscribed" its jurisdiction to review the CAVC's decision for either legal or factual error. Pet. App. 5.[5] The court of appeals then held that CAVC properly construed the 1998 version of 38 C.F.R. 3.327(a) and that its interpretation "applies with equal force to the relevant portion of the 1979 version of that regulation." Pet. App. 7.[6]

The court of appeals rejected petitioner's argument that the doctrine that veterans benefits provisions must be construed favorably to the veteran meant that the reexamination regulation required the VA to re-

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[4] The CAVC explained that 38 U.S.C. 5110(b)(2) and 38 C.F.R. 3.400(o)(2) authorize an increased rating to be made effective up to one year prior to the VA's receipt of the claim. Pet. App. 18.

[5] Section 7292 provides in relevant part:

> (c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision.
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> (d)(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

[6] The 1979 version of Section 3.327(a) states that "[r]eexamination will be requested wherever evidence indicates there has been a material increase in disability since the last examination." 38 C.F.R. 3.327(a) (1979).

examine the veteran "in *all* cases in which a veteran attempts to reopen a claim for a service-connected disability." Pet. App. 6. The court of appeals explained that "[t]he plain language [of the regulation] can only be construed to mean that the [VA] is not required to request that the veteran be reexamined in *all* cases, but rather only when there is evidence suggesting a material change in the veteran's disability." *Id.* at 7-8. The court of appeals further held that, in light of the limited review prescribed by 38 U.S.C. 7292, it lacked jurisdiction to consider whether petitioner had provided adequate evidence to trigger the VA's duty to request a reexamination, or whether the VA's failure to order a reexamination, if required, constituted clear and unmistakable error. Pet. App. 9-10.

ARGUMENT

1. Petitioner argues (Pet. 6-12) that the court of appeals' interpretation of 38 C.F.R. 3.327(a) conflicts with the canon of construction that veterans benefits provisions must be construed favorably to veterans. That contention lacks merit, and does not warrant further review by this Court.

The 1979 version of the reexamination regulation provided:

> Reexamination will be requested whenever evidence indicates there has been a material increase in disability since the last examination, or where the disability is likely to improve materially in the future.

38 C.F.R. 3.327(a) (1979). Petitioner contends that the requirement of "evidence indicating a material increase in the disability" to warrant a reexamination may be satisfied by "the mere fact of a veteran's request for an

increase [in his disability rating]." Pet. 7. As the court of appeals explained (Pet. App. 7-8), however, the plain text of the regulation bars that construction. The regulation provides for reexaminations only upon a showing that "there has been a material increase in disability since the last examination," or "the disability is likely to improve materially in the future." 38 C.F.R. 3.327(a) (1979). Those conditions are rendered meaningless under petitioner's construction, which would require a reexamination upon any application for an increase in disability rating. Pet. App. 6. The court of appeals therefore correctly concluded that "[a] bald, unsubstantiated claim for an increase in disability rating is not evidence of a material change in that disability and is insufficient to trigger the agency's responsibility to request a reexamination." *Id.* at 9.[7]

That conclusion does not conflict with *King* v. *St. Vincent's Hospital*, 502 U.S. 215 (1991), and *Brown* v. *Gardner*, 513 U.S. 115 (1994), which recognize that veterans benefits provisions must be construed favorably to veterans. As the court of appeals noted, that canon of construction "does not enable [the court] to ignore the plain language of the regulation, which indicates that a reexamination is necessary only if one of the conditions set forth in the regulation is satisfied." Pet. App. 8. Indeed, *Gardner* itself explained "that interpretive *doubt* is to be resolved in the veteran's favor, see *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 220-

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[7] The court of appeals also noted that petitioner's "argument is even weaker under the 1998 version of the regulation, as that version explicitly states that reexaminations are necessary when the 'VA determines' that they are necessary." Pet. App. 9 n.3. The fact that this case turns on the construction of a version of a regulation whose text has since been modified is an additional reason why certiorari is not warranted.

221, n.9 (1991)." 513 U.S. at 118 (emphasis added). Neither *King* nor *Gardner* suggests that such a canon of construction authorizes a court to reach a result favorable to a veteran even though the applicable statute or regulation unambiguously bars that result.[8]

2. Petitioner also argues (Pet. 12-15) that this Court should grant review to provide guidance respecting the court of appeals' recent decision in *Hayre* v. *West*, 188 F.3d 1327 (Fed. Cir. 1999). In *Hayre*, the court of appeals held that the CAVC committed legal error in concluding that a single request by the agency's regional office for a veteran's service medical records fulfills the agency's duty to assist the veteran. *Id.* at 1332. The court of appeals further held that, if on remand the CAVC finds a breach of the VA's duty to assist, the decision of the VA or the Board denying benefits is not final and the case must be remanded to the agency to fulfill its duty to assist and to determine whether an award of benefits is warranted. *Id.* at 1335.

Petitioner contends (Pet. 12-13) that under *Hayre* he is entitled to a remand to the CAVC for a determination whether the 1979 decision was final. That contention lacks merit. Unlike *Hayre*, the court of appeals did not find any legal error in the CAVC's decision. Rather, the decision below rejected petitioner's contention that an application for an increase in disability rating alone is sufficient to trigger the agency's responsibility to request a reexamination and upheld the

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[8] Moreover, petitioner would not necessarily prevail even if he established that a reexamination in 1979 was mandatory and the VA breached its duty to assist him by not providing for one. As the court of appeals noted (Pet. App. 10 n.4), a recently adopted regulation provides that a breach of the duty to assist does not constitute clear and unmistakable error. 38 C.F.R. 20.1403(d)(2) (1999).

agency's determination that "the *veteran* must come forward with at least some evidence that there has in fact been a material change in his or her disability when that veteran seeks a rating increase." Pet. App. 9.

In any event, the CAVC properly found that the agency did not breach its duty to assist petitioner in developing the record. Pet. App. 14-15. When the VA examined petitioner in 1979, petitioner "was not seeking treatment for his psychiatric disability nor, apparently, did he inform the physician at [the VA] that such a condition had recurred." *Id.* at 15. Thus, because petitioner made no attempt in 1979 to have a psychiatric disability diagnosed or treated, the "VA ha[d] no duty to seek to obtain records of which it has no notice." *Ibid.* (quoting *Porter* v. *Brown*, 5 Vet. App. 233, 236-237 (1993)). That fact-bound determination is correct and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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