No. 05-944

In the Supreme Court of the United States

DISABLED AMERICAN VETERANS, PETITIONER

v.

R. JAMES NICHOLSON,
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 38 C.F.R. 20.901(a), which authorizes the Board of Veterans Appeals to obtain certain expert medical opinions from medical experts within the Department of Veterans Affairs, is consistent with 38 U.S.C. 7109(a), which authorizes the Board of Veterans Appeals to obtain "expert medical opinion, in addition to that available within the Department, * * * from one or more independent medical experts who are not employees of the Department."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Case—Continued: Page

Statutes and regulations:

Miscellaneous:

Miscellaneous—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 419 F.3d 1317.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2005. A petition for rehearing and rehearing en banc was denied on October 27, 2005 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on January 25, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) administers the disability compensation program that provides

benefits to veterans who suffer a "disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. 1110. To receive benefits, a veteran must file a claim with the VA. 38 U.S.C. 5101(a). The claim is then decided by an "agency of original jurisdiction," which is usually a VA regional office. 38 C.F.R. 20.3(a); 38 C.F.R. 3.100(a). If that decision is adverse, the veteran has the right to "one review on appeal to the Secretary" of Veterans Affairs. 38 U.S.C. 7104(a); 38 C.F.R. 20.101(a). By statute, the final decision of the Secretary on such appeals is made by the Board of Veterans Appeals (Board). 38 U.S.C. 7104(a).

To establish "entitlement to disability compensation benefits," the veteran "must show (1) a current disability; (2) an in-service precipitating disease, injury or event; and (3) nexus between the current disability and the in-service events." Pet. App. 2a-3a (citing *Epps* v. *Gober*, 126 F.3d 1464, 1468 (Fed. Cir. 1997), cert. denied, 524 U.S. 940 (1998); *Shedden* v. *Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)). The Secretary is statutorily required to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit," 38 U.S.C. 5103A(a)(1), which include "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim," 38 U.S.C. 5103A(d)(1).

With respect to cases that have been appealed to the Board, 38 U.S.C. 7109(a) provides that:

> When, in the judgment of the Board, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in an appeal case, the Board may secure an advisory medical opinion from one or

more independent medical experts who are not employees of the Department.

2. "[F]or many years," the VA has implemented the authority of 38 U.S.C. 7109(a) through regulations that authorize the Board to obtain medical opinions from health professionals in the VA, in addition to opinions from medical experts external to the VA. 66 Fed. Reg. 38,158, 38,159 (2001). Prior to 2001, the regulation regarding VA medical experts, 38 C.F.R. 20.901(a), provided that "[t]he Board may obtain a medical opinion from the Chief Medical Director of the Veterans Health Administration of the Department of Veterans Affairs on medical questions involved in the consideration of an appeal when, in its judgment, such medical expertise is needed for equitable disposition of an appeal." 38 C.F.R. 20.901(a)(2001); see 66 Fed. Reg. at 38,159. The provision of the regulation relating to external medical opinions, 38 C.F.R. 20.901(d), provided, in pertinent part, that "[w]hen, in the judgment of the Board, additional medical opinion is warranted by the medical complexity or controversy involved in an appeal, the Board may obtain an advisory medical opinion from one or more medical experts who are not employees of the Department of Veterans Affairs." *Ibid.*

The regulation regarding VA medical experts "has always been intended to reflect that the Board may obtain medical opinions from appropriate health care professionals in [the Veterans Health Administration (VHA)]." 66 Fed. Reg. at 38,159. "However, there [was] some confusion as to whether th[at] provision permitted the Board to obtain a medical opinion from an individual in VHA other than the Under Secretary for Health (the title of Chief Medical Director was changed to Under Secretary for Health)." *Ibid.* To clarify the issue, the

VA published notice of a revision to 38 C.F.R. 20.901(a) in 2001, and provided an opportunity for comments. 66 Fed. Reg. at 38,159.

The new regulation was adopted on April 15, 2004. 69 Fed. Reg. 19,935. It provides:

> The Board may obtain a medical opinion from an appropriate health care professional in the Veterans Health Administration of the Department of Veterans Affairs on medical questions involved in the consideration of an appeal when, in its judgment, such medical expertise is needed for equitable disposition of an appeal.

38 C.F.R. 20.901(a); see 69 Fed. Reg. at 19,935. No changes were made to 38 C.F.R. 20.901(d), the external medical opinion regulation.

3. Petitioner filed a petition for review, claiming that the newly promulgated regulation was not authorized by 38 U.S.C. 7109(a). According to petitioner, Section 7109(a) authorizes "the Board to secure advisory medical opinions" only "from 'independent medical experts who are not employees' of the VA." Pet. App. 10a (citation omitted). Therefore, petitioner alleged, the Board's consideration of medical opinions from VA medical experts violates the "one review on appeal" requirement of 38 U.S.C. 7104(a). In a separate, unrelated case entitled *Disabled American Veterans* v. *Secretary of Veterans Affairs (DAV)*, 327 F.3d 1339 (2003), the United States Court of Appeals for the Federal Circuit had held that the "one review on appeal" requirement generally prevents the Board from considering new evidence on appeal without first referring the evidence to the regional office for initial consideration or obtaining the claimant's waiver of regional office consideration, *id.* at 1341-1342. The *DAV* court noted, however, that "when Congress

intended to authorize the Board to obtain additional evidence without 'one review on appeal to the Secretary,' it knew how to do so." *Id.* at 1347. In particular, the *DAV* court observed that "Congress has provided express statutory authority to permit the Board to obtain additional evidence, such as expert medical opinions in specific cases." *Ibid.*

4. The court of appeals upheld the regulation. Pet. App. 1a-21a. The court reasoned that 38 U.S.C. 7109(a), which allows the Board to obtain "expert medical opinion, in addition to that available within the Department," Pet. App. 10a, authorizes "the Board to secure medical opinions from 'within the Department' while a claim is on appeal," *id.* at 15a. According to the court of appeals, "Congress enacted section 7109 upon the assumption—expressed in the statutory text—that the Board had authority to procure an internal VA medical opinion." *Id.* at 11a. That assumption was "tantamount to a direct grant of authority to secure internal VA opinions," especially in view of the fact that the statute "was enacted against the background of a long-standing agency practice of securing internal VA medical opinions." *Id.* at 11a-12a. Therefore, the court concluded that VA medical opinions are, by virtue of 38 U.S.C. 7109(a), a statutorily-authorized exception to the "one review on appeal" requirement of 38 U.S.C. 7104(a). Pet. App. 9a.

Judge Mayer dissented. Pet. App. 17a-21a. He concluded that "the nonessential phrase 'in addition to that available within the Department' contained in section 7109(a)" did not "provide[] an exception to the requirement of 38 U.S.C. 7104(a) that '[a]ll questions . . . subject to decision by the Secretary shall be subject to one review on appeal.'" Pet. App. 17a, 19a (quoting 38 U.S.C. 7104(a), 7109(a)).

ARGUMENT

The court of appeals correctly held that 38 U.S.C. 7109(a), which authorizes the Board to obtain "expert medical opinion, in addition to that available within the Department," necessarily confirms the Board's authority to obtain expert medical opinion from within the Department with respect to appeals pending before the Board. Further review is not warranted.

1. Petitioner contends (Pet. 7-12) that the plain language of 38 U.S.C. 7109(a) does not authorize the Board to obtain and consider medical opinions from VA health professionals for the first time on appeal. That contention does not merit review. In the first place, even if Section 7109(a) did not affirmatively authorize the Board's practice, there would be no merit to petitioner's challenge, because this Court has long recognized that agencies have broad authority to "fashion their own rules of procedure" when a statute does not specify the process to be used. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) (quoting *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965)); *Cameron* v. *United States*, 252 U.S. 450, 460-463 (1920).

In any event, as the court of appeals correctly concluded, "the statute clearly provides authority" for the Board to obtain expert medical opinion from within the Department. Pet. App. 9a. Section 7109(a) explicitly provides that "in addition to [expert medical opinion] available within the Department, * * * the Board may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department." 38 U.S.C. 7109(a). By authorizing the Board to obtain medical opinion from external experts "in addition to" medical opinion from VA experts, the

statute necessarily confirms the Board's authority to obtain opinions from VA experts.

Petitioner's contrary interpretation, under which Section 7109(a) would authorize *only* the receipt of external medical opinion, would render the clause "in addition to that available within the Department" entirely superfluous. Statutes should be read in a manner that does not "render superfluous the preceding clauses." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 142 (1985). The court of appeals properly gave effect to each clause of the statute in concluding that Section 7109(a) authorized both internal and external medical opinions. Further review is not warranted.

2. Petitioner next contends (Pet. 12-17) that the court of appeals erred in relying on the Board's historical use of VA medical opinions, because "[h]istorical practices of an agency must be abrogated when they conflict with the language and purpose of expressly authorized powers." Pet. 13. Petitioner is mistaken. The historical practices of the agency are consistent with the plain language of Section 7109(a), and accordingly there is no basis for disregarding the Board's longstanding exercise of authority to obtain and consider internal medical opinion.

As Congress has recognized, the Board's reliance on VA medical opinions pre-dates the 1962 passage of Section 7109(a). S. Rep. No. 1844, 87th Cong., 2d Sess. (1962); accord *Veterans Administration Department of Medicine and Surgery Manual M-2, Professional Services* Pt. 1, at 8-1 (Sept. 9, 1959) (establishing the practice as early as 1959). The Senate Report on the 1962 legislation that enacted Section 7109(a) specifically acknowledges the Board's practices in that regard:

> The bill, as approved by the committee, makes no reference to the Board of Veterans' Appeals securing an advisory opinion from the Chief Medical Director of the Veterans' Administration since this is a matter within Agency discretion and ample authority for this practice now exists. In fact, the committee was informed that between 200 and 300 cases per year are currently submitted to the Chief Medical Director by the Board of Veterans' Appeals for expert advisory opinions.

S. Rep. No. 1844, *supra*, at 2. The Senate Report also reflects Congress's understanding that the Board's use of VA medical opinions would continue: "It might logically be expected that enactment of the bill * * * would result in an increase in the number of cases in which medical advisory opinions from either the Chief Medical Director or independent experts would be requested." *Ibid.* Thus, when it authorized the Board to obtain "expert medical opinion, *in addition to that available within* the Department," 38 U.S.C. 7109(a) (emphasis added), Congress "implicitly approved" the longstanding administrative practice of allowing the Board to rely on VA medical opinions. See, *e.g.*, *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 468 (1987); *Dames & Moore* v. *Regan*, 453 U.S. 654, 680 (1981).

Congress has subsequently ratified that agency interpretation by revising Section 7109(a) twice without changing the pertinent language regarding VA medical opinions. In 1988, Congress amended Section 7109(a) by substituting "the Board may" for "the Board is authorized to" secure an advisory medical opinion. Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, Tit. I, § 103(b)(1), 102 Stat. 4107. In 1991, Congress amended Section 7109(a) by substituting "Department" for "Vet-

erans' Administration" as part of an Act codifying the establishment of the Department of Veterans Affairs. Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 4(a)(3) and (4), 105 Stat. 404. "Congress is presumed to be aware of an administrative * * * interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). The historical practice of the agency thus supports the court of appeals' conclusion that Section 7109(a) authorizes the Board to obtain and consider medical opinion from within the VA.

Petitioner's reliance on this Court's decision in *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103 (1978), is misplaced. While the courts are not "obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute," *id.* at 118 (citations omitted), the regulation at issue here neither frustrates nor contradicts the statute's language or purpose. Instead, both the statutory language and the legislative history of Section 7109(a) are consistent with the conclusion that the Board is authorized to obtain VA medical opinions.

3. Even if the language of the statute were ambiguous, the Secretary's reasonable interpretation, embodied in regulations issued through notice-and-comment

rulemaking, would be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Deference is due to the agency's construction even if it is not "the only one it permissibly could have adopted" or "even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11 (citing cases). The Secretary's conclusion that Section 7109(a) authorizes both VA and external medical opinions is reasonable and entitled to deference.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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