No. 17-700

In the Supreme Court of the United States

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC., PETITIONER

v.

DAVID J. SHULKIN, 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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QUESTIONS PRESENTED

Enacted as part of the Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145, 38 U.S.C. 5121A authorizes an eligible survivor to substitute for a deceased veteran in a claim for benefits or an appeal of a decision on a benefits claim. Pursuant to statutory authorization, the Department of Veterans Affairs (VA) has promulgated regulations governing the substitution process. See 79 Fed. Reg. 52,977 (Sept. 5, 2014). The questions presented are as follows:

1. Whether the VA acted permissibly in requiring that a survivor who seeks to be substituted for a deceased veteran must submit evidence of his eligibility to be substituted.

2. Whether the VA acted permissibly in determining that, when a veteran's appeal to the Board of Veterans' Appeals (Board) is pending at the time of the veteran's death, the decision whether a particular survivor will be substituted should be made in the first instance by the agency of original jurisdiction rather than by the Board.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 809 F.3d 1359.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2016. A petition for rehearing was denied on March 30, 2016 (Pet. App. 13a-14a). The petition for a writ of certiorari was filed on June 8, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before 2008, if a veteran seeking benefits from the Department of Veterans Affairs (VA) died while his claim was pending, an eligible survivor could not continue to prosecute the veteran's claim. Pet. App. 2a. Rather, the survivor would need to file a separate claim for accrued benefits and to proceed from the beginning

of the claims process. *Ibid.*; see 38 U.S.C. 5121(a); *Copeland* v. *Shinseki*, 26 Vet. App. 86, 88 (2012) (citing 76 Fed. Reg. 8666, 8669 (Feb. 15, 2011)).

In 2008, Congress enacted the Veterans' Benefits Improvement Act of 2008 (Act), Pub. L. No. 110-389, 122 Stat. 4145, to streamline survivors' claims for benefits. Pet. App. 3a. Under the Act, an eligible survivor of a deceased veteran may be substituted for the veteran in a pending claim for veterans' benefits, or in an appeal of a decision on a claim for such benefits that is pending before the Board of Veterans' Appeals (Board). See 38 U.S.C. 5121A. Section 5121A now provides, in relevant part:

> (1) If a claimant dies while a claim for any benefit under a law administered by the Secretary, or an appeal of a decision with respect to such a claim, is pending, a living person who would be eligible to receive accrued benefits due to the claimant under section 5121(a) of this title may, not later than one year after the date of the death of such claimant, file a request to be substituted as the claimant for the purposes of processing the claim to completion.
>
> (2) Any person seeking to be substituted for the claimant shall present evidence of the right to claim such status within such time as prescribed by the Secretary in regulations.
>
> (3) Substitution under this subsection shall be in accordance with such regulations as the Secretary may prescribe.

38 U.S.C. 5121A(a).

2. In 2011, the VA published in the Federal Register a notice of proposed rulemaking to implement Section 5121A. As relevant here, the proposed rule (1) added

new 38 C.F.R. 3.1010 to address procedures related to the adjudication of substitution matters; and (2) amended 38 C.F.R. Part 20, the Board's rules of practice, to address substitution in appeals pending before the Board. 76 Fed. Reg. at 8667-8670, 8674. In 2014, the VA published the final rule, with revisions in response to comments not relevant to this case. The final rule became effective on October 6, 2014. 79 Fed. Reg. 52,977, 52,978 (Sept. 5, 2014).

Under the final rule, if a veteran dies while a claim or appeal to the Board is pending, an individual who would be entitled to accrued benefits may file a request to be substituted for the deceased claimant in order to continue the claim or appeal. 38 C.F.R. 3.1010(a); 79 Fed. Reg. at 52,982. That substitution relieves the survivor of the need to file a new claim. In addition, unlike with a separate accrued-benefits claim, the VA in considering a continued claim for veterans' benefits is not limited to the evidence contained in the claims file at the time of the veteran's death, but may allow further development of the record. 38 C.F.R. 3.1010(f)(3); 79 Fed. Reg. at 52,983.

Consistent with Section 5121A(a)(2), the VA's 2014 regulations also established procedures for determining the eligibility of a survivor seeking substitution. *Inter alia*, the regulations state that "[a] person filing a request to substitute must provide evidence of eligibility to substitute." 38 C.F.R. 3.1010(d). The regulations define "evidence of eligibility to substitute" to mean "evidence demonstrating that the person is among those listed in the categories of eligible persons in § 3.1000(a)(1) through (5) and first in priority order." *Ibid.* The enumerated categories include a surviving spouse, child, and parent. See 38 C.F.R. 3.1000(a).

In accordance with Section 5121A(a)(3), the VA promulgated other regulations detailing the substitution process. In particular, those regulations explain how the substitution process will work if a claimant dies while his appeal is pending before the Board. In that situation, the Board must dismiss the appeal without prejudice while the agency of original jurisdiction evaluates the request to substitute. 38 C.F.R. 20.1302(a). If the agency of original jurisdiction grants the substitution request, then the case "assume[s] its original place on the [Board's] docket." *Ibid.* And "if the deceased appellant's case was advanced on the docket prior to his or her death, the substitute will receive the benefit of the advanced placement." 38 C.F.R. 20.900(a)(2).

3. Pursuant to 38 U.S.C. 502, petitioner sought review of the VA regulations implementing Section 5121A. Pet. App. 4a. Section 502 authorizes the Federal Circuit to review VA rules or regulations that are alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 38 U.S.C. 502; *Hilario* v. *Secretary, Dep't of Veterans Affairs*, 937 F.2d 586, 588 (Fed. Cir. 1991).

Petitioner challenged several portions of the regulations, including 38 C.F.R. 3.1010(d), 20.900(a)(2), and 20.1302(a). Pet. App. 2a. First, it contended that Section 3.1010(d), which requires persons who seek to be substituted for deceased veterans to introduce evidence of their eligibility, imposes unnecessary administrative burdens on dependents whom the VA has already recognized at the time of the veteran's death. *Id.* at 4a, 6a. In petitioner's view, requiring those dependents to offer evidence of eligibility when the VA "already has evidence of their status in its files is arbitrary and capricious." *Id.* at 4a. Second, petitioner challenged Sections

20.900(a)(2) and 20.1302(a), which govern requests to be substituted for a veteran who dies while his appeal to the Board is pending. Pet. App. 9a. Petitioner contended that the Board should decide the substitution request in the first instance, rather than dismiss without prejudice an appeal that is pending when the claimant dies. *Id.* at 10a.

The Federal Circuit denied the petition for review. Pet. App. 12a. The court first rejected petitioner's challenge to 38 C.F.R. 3.1010(d), which requires prospective substitutes to provide evidence of their eligibility in all cases. Pet. App. 4a-8a. The court looked to the statutory text, which requires that "[a]ny person seeking to be substituted for the claimant shall present evidence of the right to claim such status." 38 U.S.C. 5121A(a)(2); see Pet. App. 6a. The court explained that the statute "appears to be unambiguous" in requiring all prospective substitutes to present evidence of their eligibility to claim such status. Pet. App. 6a. The court therefore concluded that the regulation could not be "faulted for being inconsistent with the statutory directive." *Id.* at 7a.

The court of appeals further held that, if the statute were ambiguous, the VA's interpretation of the statute would be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Pet. App. 7a. The court explained that the VA's regulations were reasonable, even in circumstances where material in the veteran's file already identifies certain dependents, because "various events, such as divorce, remarriage, or the birth of a child could make the information in the veteran's file at [the] time of his death inaccurate." *Ibid.*; see 79 Fed. Reg. at 52,980. The court rejected petitioner's contrary

argument that the regulations could not receive *Chevron* deference because "interpretive doubt is to be resolved in the veteran's favor." Pet. App. 8a (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)). The court explained that, whatever the import of that interpretive principle, a court "must take care not to invalidate otherwise reasonable regulations simply because they do not provide for a pro-claimant outcome in every imaginable case." *Ibid.* (quoting *Sears* v. *Principi*, 349 F.3d 1326, 1331-1332 (Fed. Cir. 2003), cert. denied, 541 U.S. 960 (2004)).

The court of appeals next rejected petitioner's challenge to 38 C.F.R. 20.900(a)(2) and 20.1302(a), which require the originating agency to determine the propriety of substitution in the first instance when an appeal is pending before the Board at the time the claimant dies. Pet. App. 9a-12a. The court noted that "section 5121A provides that substitution under the new statute 'shall be in accordance with such regulations as the Secretary [of Veterans Affairs] may prescribe.'" *Id.* at 10a (quoting 38 U.S.C. 5121A(a)(3)) (brackets in original). Given that express delegation of rulemaking authority, the court explained, the VA regulations are entitled to "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Ibid.* (citing *Chevron*, 467 U.S. at 844).

The court of appeals determined that the regulations at issue "easily satisfy that standard." Pet. App. 10a. It explained that the VA had considered petitioner's argument that the Board should decide substitution issues that arise while a case is pending before it, but had reasonably concluded that the Board's appellate jurisdiction does not permit it to entertain substitution requests in the first instance. *Id.* at 10a-11a. The court

further explained that, in the VA's view, "allowing the Board to decide a substitution request would deprive the survivor of the right to the 'one review on appeal' rule mandated by 38 US.C. 7104(a)." *Id.* at 11a (quoting 79 Fed. Reg. at 52,979).[1] Finally, the court noted that "the Board is an appellate tribunal and is not well equipped to conduct the fact-gathering that may be necessary to determine eligibility for substitution." *Ibid.*

Petitioner filed a petition for rehearing en banc, which the court of appeals denied. Pet. App. 13a-14a.

ARGUMENT

Petitioner contends (Pet. 7-11) that the court of appeals erred by applying *Chevron* deference in determining whether the VA's regulations reflect a reasonable construction of the statute. In petitioner's view (Pet. 10-11), the court's application of *Chevron* conflicts with a special canon of construction that requires statutes involving veterans to be construed in the beneficiaries' favor. The court below correctly upheld the VA's regulations implementing Section 5121A, without any need to resolve the perceived conflict between those two principles of statutory construction. And even if the pro-veteran canon were given priority, there is no reason to believe that the outcome would change. Section 5121A cannot plausibly be construed to *require* the regulatory approach that petitioner advocates, and the court below considered the regulations' effect on veterans and their survivors and emphasized the several ways in which the regulations protect beneficiaries.

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[1] Section 7104 provides: "All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decision on such appeals shall be made by the Board." 38 U.S.C. 7104(a).

1. This Court has instructed that, when a statute is ambiguous, courts should defer to the reasonable construction of the agency charged with administering it. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). The court has also endorsed, albeit with less explanation, a "rule that interpretive doubt" in a statute providing benefits to veterans "is to be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Petitioner asserts (Pet. 7) that "tension" exists between "the application of the rules of deference under *Chevron* and special canons of statutory construction for statutes involving veterans and their survivors." This case, however, does not implicate any such tension.

a. In the court of appeals, petitioner challenged two aspects of the regulations that the VA had promulgated to implement Section 5121A. First, petitioner contended that individuals who have previously been recognized as dependents of the deceased veteran should not be required to provide evidence of eligibility to be substituted, and that the regulations requiring such evidence are arbitrary and capricious. Pet. App. 4a; see 38 C.F.R. 3.1010(d). The court correctly rejected that contention, concluding that the relevant statutory provision "appears to be unambiguous." Pet. App. 6a. The statute provides that "*[a]ny person* seeking to be substituted for the claimant shall present evidence of the right to claim such status within such time as prescribed by the Secretary in regulations." 38 U.S.C. 5121A(a)(2) (emphasis added). As the court noted, Pet. App. 6a, the VA's regulations "closely track[]" that statutory language by stating that "[a] person filing a request to substitute must provide evidence of eligibility to substitute." 38 C.F.R. 3.1010(d).

Petitioner does not challenge the court of appeals' determination that the statute "appears to be unambiguous." Pet. App. 6a. Yet petitioner acknowledges that any supposed conflict between the pro-veteran canon and *Chevron* deference arises only when a court seeks to interpret "the meaning of ambiguous statutes." Pet. 9; see Pet. 9-10. Because Section 5121A(a)(2) unambiguously requires the submission of evidence in this context (while authorizing the VA to "prescribe[]" the "time" within which such evidence must be submitted, 38 U.S.C. 5121A(a)(2)), any special canon of construction requiring that "interpretive doubt" be resolved in the veteran's favor, *Gardner*, 513 U.S. at 118, has no application here.

As an alternative basis for its decision, the court of appeals further concluded that the VA's eligibility regulations would survive scrutiny "[e]ven assuming the statute is not deemed to be entirely unambiguous." Pet. App. 7a. The court briefly discussed petitioner's argument about *Gardner* in the course of that analysis. See *id.* at 8a. But that discussion appears only in support of the court's alternative rationale and is unnecessary to the result in this case.

In any event, the court of appeals correctly rejected petitioner's contention that *Chevron* is inapplicable in cases involving veterans and their survivors. Pet. App. 8a. This Court has never held that the VA's reasonable construction of a statute should be disregarded whenever the agency declines to adopt the most pro-veteran construction possible. Rather, the canon that statutory ambiguities should be resolved in the veteran's favor comes into play only after a court has used all interpretive tools at its disposal, including principles of *Chevron* deference. See *Nielson* v. *Shinseki*, 607 F.3d 802, 808

n.4 (Fed. Cir. 2010); *Sears* v. *Principi*, 349 F.3d 1326, 1331-1332 (Fed. Cir. 2003), cert. denied, 541 U.S. 960 (2004); *Terry* v. *Principi*, 340 F.3d 1378, 1384 (Fed. Cir. 2003), cert. denied, 541 U.S. 904 (2004).

This Court's decision in *Gardner* does not suggest otherwise. In that case, the Court struck down a VA regulation that contravened the plain language of the controlling statute. See 513 U.S. at 116-118. Although the Court noted in passing that interpretive doubt should be resolved in favor of veterans, *id.* at 118, it did not hold that the pro-veteran canon negates *Chevron* deference. Nor did it apply that canon to reject the best—indeed, the unambiguous—reading of the statutory language, as petitioner urges here.

b. The court of appeals also held that the VA had acted reasonably in promulgating regulations that require the originating agency, rather than the Board, to decide requests to substitute in the first instance when an appeal is already pending before the Board. Pet. App. 10a. It is unclear whether petitioner believes that the pro-veteran canon applies to that conclusion. The court did not mention *Gardner* in that section of its opinion, see *id.* at 9a-12a, perhaps because of Congress's express delegation to the agency. Nor does petitioner grapple with the court's observation that "the Board is an appellate tribunal and is not well equipped to conduct the fact-gathering that may be necessary for substitution." *Id.* at 11a.

Section 5121A mandates that substitution "shall be in accordance with such regulations as the Secretary may prescribe," 38 U.S.C. 5121A(a)(3), and it gives the Secretary broad power to "fill the gap explicitly left by Congress for the agency to fill," Pet. App. 10a. The statute itself cannot reasonably be construed as resolving,

one way or the other, the question whether the Board or the agency of original jurisdiction should resolve substitution issues in the first instance when a veteran dies while his Board appeal is pending. Rather, the Act *unambiguously* vests the VA with authority to decide which procedure is more appropriate. With respect to the permissibility of the VA's regulatory approach to that issue, the Act thus lacks the "interpretive doubt" that is a prerequisite to application of the pro-veteran canon. To require the VA to adopt the most "pro-veteran" approach to all substitution issues (even if that approach could be reliably identified, but cf. pp. 11-12, *infra*) would subvert Congress's evident intent that the expert agency be given broad discretion to devise appropriate substitution procedures.

2. In any event, petitioner is incorrect to suggest (Pet. 3-4, 7-8) that the court of appeals disregarded the pro-veteran canon. To the contrary, in reviewing the challenged VA regulations, the court recounted the several ways in which those regulations *protect* beneficiaries.

The requirement that a person who seeks to be substituted for a deceased veteran must introduce evidence of eligibility is neither pro- nor anti-veteran on its face. The regulation requiring such evidence seeks to ensure that the correct survivor is substituted by mandating "current and accurate information" needed "to promptly process substitution requests." Pet. App. 7a. The requirement thus protects the correct survivor, such as a "newborn child," at the expense of a lower-priority dependent, such as "the veteran's mother." *Ibid.*; see *ibid.* (explaining that "a child has a higher priority than a dependent parent"). Petitioner may believe that the re-

quirement to submit evidence subjects survivors to administrative burdens that are disproportionate to the gains in accuracy that the requirement can be expected to produce. But even if the Act did not mandate the submission of evidence (see pp. 8-9, *supra*), there is no basis for viewing either of the competing approaches as more "pro-veteran" than the other.

The same is true of the requirement that a substitution request be decided in the first instance by the originating agency rather than by the Board. In declining to invalidate the regulations at 38 C.F.R. 20.900(a)(2) and 20.1302(a), the court of appeals explained that those regulations "enable a dissatisfied prospective substitute to obtain Board review of the substitution issue on appeal." Pet. App. 11a. Petitioner's preferred rule, by contrast, "would deprive the survivor of the right to the 'one review on appeal' mandated by 38 U.S.C. § 7104(a)." *Ibid.* (quoting 79 Fed. Reg. at 52,979).

The court of appeals also reasoned that initial review by the Board could lead to inaccuracies, since that appellate tribunal "is not well equipped to conduct the fact-gathering that may be necessary." Pet. App. 11a. And returning to the originating agency does not disadvantage the survivor who is ultimately substituted, since the regulations provide that the substituted survivor will return to the same spot in line that he would have occupied if the appeal had remained pending before the Board. See 38 C.F.R. 20.900(a)(2), 20.1302(a). The regulations thus protect substituted survivors' procedural rights, rather than limiting them to an incomplete and potentially inaccurate process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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