No. 98-1203

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM D. GILPIN, PETITIONER

v.

TOGO D. WEST, 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

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

DAVID M. COHEN
LUKE LEVASSEUR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a regulation of the Secretary of Veterans Affairs requiring "current symptomatology" as a prerequisite to disability compensation for Post-Traumatic Stress Disorder is per se unreasonable and not entitled to judicial deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the ground that it does not resolve all interpretive doubts in favor of the veteran.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bailey v. *West*, 160 F.3d 1360 (Fed. Cir. 1998)	8
Boone v. *Lightner*, 319 U.S. 561 (1943)	7
Brown v. *Gardner*, 513 U.S. 115 (1994)	6, 7
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	5, 6, 7
Degmetich v. *Brown*, 104 F.3d 1328 (Fed. Cir. 1997)	5
Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946)	7
Hodge v. *West*, 155 F.3d 1356 (Fed. Cir. 1998)	8
King v. *St. Vincents Hosp.*, 502 U.S. 215 (1991)	7
National R.R. Passenger Corp. v. *Boston & Maine Corp.*, 503 U.S. 407 (1992)	6
Prenzler v. *Derwinski*, 928 F.2d 392 (Fed. Cir. 1991)	8
Smith v. *Brown*, 35 F.3d 1516 (Fed. Cir. 1994)	8

Statutes and regulations:

38 U.S.C. 1110	2, 4, 5
38 U.S.C. 1131	5
38 U.S.C. 1151	7
38 U.S.C. 1710 (1994 & Supp. III 1997)	5, 8
38 U.S.C. 1712 (1994 & Supp. III 1997)	5, 8
38 U.S.C. 5110(a)	5, 8
38 U.S.C. 5111(a)	5, 8

Regulations—Continued: Page

38 C.F.R.:
Section 3.304(f) 2, 4, 5, 6, 8, 9
Section 3.358(c)(3) 6

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1203

WILLIAM D. GILPIN, PETITIONER

v.

TOGO D. WEST, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 155 F.3d 1353. The memorandum opinion of the United States Court of Veterans Appeals (Pet. App. 9-20) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22) was entered on September 11, 1998. A petition for rehearing was denied on October 28, 1998 (Pet. App. 21). The petition for a writ of certiorari was filed on January 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1110 of Title 38 of the United States Code provides for compensation to veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty * * * during a period of war." Veterans requesting compensation under that Section for claims of service-related Post-Traumatic Stress Disorder (PTSD) must present "medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link, established by medical evidence, between current symptomatology and the claimed inservice stressor." 38 C.F.R. 3.304(f).

2. Petitioner served in the United States Army from July 1965 to July 1968. Pet. App. 2, 9. Service personnel records show that for some of that time (October 1966 to November 1967) petitioner served as a construction machine operator in the Republic of Vietnam. *Id.* at 9-10. Petitioner's separation examination was negative for PTSD. *Id.* at 2, 10.

In January 1987, petitioner submitted a claim to the Department of Veterans Affairs (VA) seeking disability compensation for, among other things, "Vietnam stress." Pet. App. 2, 10. Petitioner underwent a complete psychiatric examination on March 5, 1987. *Id.* at 11. The examining physician noted "Doubt Post Traumatic Stress Disorder." *Ibid.* In July 1987, the VA denied petitioner's claim for disability compensation for PTSD. *Id.* at 2, 11. Petitioner's appeal of that denial was affirmed by the Board of Veterans' Appeals (BVA). *Ibid.*

3. In February 1991, petitioner asked the VA to reevaluate his PTSD claim. Pet. App. 12. The VA reviewed petitioner's medical and psychological records

and concluded that no new and material evidence had been submitted that justified reopening the claim. *Id.* at 2, 12. Petitioner filed a Notice of Disagreement in March 1992. *Id.* at 2. In October 1992, petitioner submitted to the VA a copy of a Social Security Administration (SSA) determination, which had become effective October 1, 1988, finding that petitioner was totally disabled due to severe depression with PTSD. *Id.* at 12-13. In response, the VA obtained copies of the evidence upon which the SSA relied in making its PTSD finding, and petitioner was examined by two more VA psychiatrists. *Id.* at 2, 12-13. Although each examining physician diagnosed petitioner with, among other things, "major depression," each also found that a diagnosis of PTSD was not warranted. *Id.* at 13-14. Based on this evidence, in April 1993 the VA again refused to reopen petitioner's PTSD claim. *Id.* at 14.

Petitioner appealed again to the BVA, and in May 1995 the BVA, after reviewing the evidence relating to the PTSD claim, again determined that it had been properly denied. Pet. App. 2, 14. Specifically, the BVA concluded that there was "'no adequately supported diagnosis of PTSD of record,' including no current diagnosis of PTSD." *Id.* at 2 (court of appeals quoting BVA opinion). The BVA acknowledged the SSA's finding of PTSD, but gave greater weight to the medical conclusions of the two more recent VA psychiatric examinations which, while noting that petitioner had some psychiatric disorders, explicitly rejected a diagnosis of PTSD. *Id.* at 19.

4. Petitioner timely appealed the BVA's decision to the Court of Veterans Appeals (CVA). In May 1997, that court also rejected petitioner's PTSD claim. The CVA noted that the Secretary's regulation setting forth the standard for evaluating claims of PTSD requires

"medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link, established by medical evidence, between current symptomatology and the claimed inservice stressor." 38 C.F.R. 3.304(f), quoted in full at Pet. App. 18. The CVA interpreted this regulation to require "a current, clear medical diagnosis of PTSD (presumed to include the adequacy of the PTSD symptomatology * * *)." Pet. App. 18-19. The CVA found that "the [BVA]'s determination that there is no valid PTSD diagnosis has a plausible basis in the record" (*id.* at 19) and that the BVA "provided adequate reasons for bases for its findings." *Id.* at 19-20. Thus, the CVA concluded, the BVA correctly determined that petitioner did not have PTSD. *Id.* at 20.

5. Petitioner then appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the CVA's decision. Petitioner argued that, by requiring evidence of "current symptomatology" in 38 C.F.R. 3.304(f), the VA impermissibly had imposed a requirement that was not contemplated in 38 U.S.C. 1110, the statute which 38 C.F.R. 3.304(f) implements. Pet. App. 3. The court of appeals began its analysis by pointing out that Section 1110 "is not plain on its face," that it "does not clearly * * * say whether past disabilities support an award of compensation," and, consequently, that "all that can be fairly said about the statute is that it is silent on the matter of when the disabled veteran must be disabled." Pet. App. 5. The legislative history of Section 1110, the court noted, was silent on that matter as well. *Ibid.* The court then stated that, "[u]nder these circumstances," the question before it was whether the VA had filled the statutory "gap" in a "rational and permissible" manner with 38

C.F.R. 3.304(f)'s "current symptomatology" requirement. See Pet. App. 5-6 (discussing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

The Federal Circuit upheld the regulation as a permissible interpretation of the statute. The court pointed out that the "current symptomatology" requirement is indistinguishable from the "current disability" requirement that the court previously had upheld as a permissible interpretation of 38 U.S.C. 1131, a statute "which is identical in all respects to section 1110 but covers disability from injury or disease incurred in 'other than a period of war.'" Pet. App. 6 (discussing *Degmetich* v. *Brown*, 104 F.3d 1328, 1332 (Fed. Cir. 1997)). Like the "current disability" requirement, the court explained, the "current symptomatology" requirement "is supportable when viewed in the context of the other statutes involving the provision of veterans' benefits." *Id.* at 7. The court stated that many of those statutes make clear that compensation can only "be given for disability existing on or after the date" on which the application for benefits is filed. *Ibid.*; see 38 U.S.C. 5110(a), 5111(a). The court also explained that the "current symptomatology" requirement is consistent with veterans benefit statutes governing nonmonetary benefits, such as medical benefits, many of which are "limited to those veterans who have a service-connected disability at the time of application." Pet. App. 7; see 38 U.S.C. 1710 (1994 & Supp. III 1997); 38 U.S.C. 1712 (Supp. III 1997). The court concluded that, "[g]iven the structure of the law as a whole, the Secretary's interpretation of 38 U.S.C. § 1110 as requiring demonstration of symptoms at the time the application is filed * * * is not impermissible." Pet. App. 7 (internal quotation marks omitted).

ARGUMENT

Petitioner contends that, under *Brown* v. *Gardner*, 513 U.S. 115 (1994), any regulation that resolves interpretative doubts adversely to a veteran is per se unreasonable and not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that consequently the Federal Circuit should not have deferred to the "current symptomatology" requirement of 38 C.F.R. 3.304(f). Pet. App. 5-6. Petitioner's contention is without merit, for neither *Gardner* nor its antecedents create a special rule for the application of *Chevron* in the veterans benefit context. The decision of the court of appeals is correct and does not conflict with any decision of this Court. Accordingly, further review of this case is not warranted.

1. "Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law." *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). We are aware of no broad exceptions or differing applications, such as petitioner urges, to the rule that "if the 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." *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

Petitioner errs in claiming that *Gardner* requires a different rule of deference in the context of VA interpretations of veterans benefit statutes. In *Gardner*, this Court held that 38 C.F.R. 3.358(c)(3)'s requirement that the veteran demonstrate "fault on the part of the VA" in order to obtain certain benefits was inconsistent with the plain language of the statute it implemented,

38 U.S.C. 1151. 513 U.S. at 117-120. As petitioner points out (Pet. 6), in doing so, the Court noted that, in interpreting veterans benefit statutes, ambiguities are resolved "after applying the rule that interpretive doubt is to be resolved in the veteran's favor." *Gardner*, 513 U.S. at 118 (citing *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991)). Seizing upon this statement, petitioner construes *Gardner* as a mandate that all VA regulations must be written to favor veterans by providing them with benefits in every conceivable circumstance under the statutes. Pet. 6-7.

Nothing in *Gardner* indicates that the Court intended to create a "no-deference" rule, under which any VA gap-filling regulation that arguably operates to "den[y] benefits" to a claimant under a veterans benefit statute "is unreasonable." Pet. 7. *Gardner* was not even decided upon the basis of deference. Because the Court found that the text of the statute was clear, the reasonableness of the VA's construction was irrelevant. *Gardner*, 513 U.S. at 120; see *Chevron*, 467 U.S. at 842 (when the text of the statute gives a clear answer, that is "the end of the matter").

The language upon which petitioner relies accurately noted the long-held understanding that veterans benefit statutes should be liberally construed in accordance with their remedial purpose. See *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (discussing the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (Act "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943) (Act "is always to be liberally construed to protect those who have been

obliged to drop their own affairs to take up the burdens of the nation"). This simply means that, in promulgating and applying regulations—indeed, in fulfilling its mission—the VA should interpret veterans benefit statutes in the context of the broad scope of the government's intentions toward veterans. See *Bailey* v. *West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (Michel, J., concurring in the judgment) ("This entire scheme is imbued with special beneficence from a grateful sovereign."). It does not mean, however, that a regulation, no matter how well-advised and consistent with the statutory scheme, is per se unreasonable whenever it precludes any claim for benefits, no matter how tenuous, that a veteran might arguably make under a statute. Nor does it disturb the fundamental principle that deference must be given to the governmental entity that administers the statute simply because, in a specific case, a regulation operates to preclude a claim. Indeed, the Federal Circuit has consistently and correctly applied that principle in the veterans benefit context. See, *e.g.*, *Hodge* v. *West*, 155 F.3d 1356, 1360-1362 (Fed. Cir. 1998); *Smith* v. *Brown*, 35 F.3d 1516, 1526-1527 (Fed. Cir. 1994); *Prenzler* v. *Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991). It did not err in doing so here.

2. There can be no doubt that the VA properly interpreted the statutory scheme when it required "current symptomatology" pursuant to 38 C.F.R. 3.304(f) in order for a veteran to receive disability benefits for PTSD. As the Federal Circuit rightly explained, the VA's requirement is consistent with statutory provisions stating that no monetary benefits can be paid to veterans to compensate them for periods of time prior to the filing of an application. See, *e.g.*, 38 U.S.C. 5110(a), 5111(a). Likewise, it is also consistent

with statutory limitations allowing the provision of non-monetary benefits to claimants who have a service-connected disability only if the disability exists at the time the application is filed. See, *e.g.*, 38 U.S.C. 1710 (1994 & Supp. III 1997); 38 U.S.C. 1712 (Supp. III 1997). The statutory scheme does not contemplate the provision of benefits to claimants for problems that may have manifested themselves in the past (that is, prior to the filing of an application) but can no longer be shown to affect the claimants. The VA's interpretation of Section 1110 in 38 C.F.R. 3.304(f) for benefits related to PTSD accords well with this statutory scheme.

The interpretation also accords well with common sense. Many veterans experience in-service stressors during their war-time duty. Not all veterans who experience such stressors develop PTSD. The only way to distinguish a PTSD sufferer, or someone who had an in-service stressor that caused him to develop full-blown PTSD, from a veteran who simply experienced an in-service stressor is to require a diagnosis of current PTSD symptoms to determine whether the veteran in fact has PTSD. In this case, the record shows that repeated psychiatric examinations of petitioner revealed that he did not suffer from PTSD. Pet. App. 2, 19. Because the record shows only that petitioner suffered an in-service stressor, and not that he had symptoms warranting a diagnosis of PTSD, the VA's regulations properly exclude him from the class of persons who may receive disability benefits for PTSD. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

DAVID M. COHEN
LUKE LEVASSEUR
Attorneys

APRIL 1999