No. 12-1419

In the Supreme Court of the United States

JOHNNIE H. BEASLEY, PETITIONER

v.

ERIC K. SHINSEKI, 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

Federal law requires the Secretary of Veterans Affairs to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. 5103A(a)(1). The law further provides that, "[i]n the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall 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). The question presented in this case is as follows:

Whether petitioner established in his petition for a writ of mandamus a clear and indisputable right to have a second medical evaluation performed by a particular treating physician.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 709 F.3d 1154. The order of the Court of Appeals for Veterans Claims (Pet. App. 16-20) is unreported. The opinion of the Board of Veterans' Appeals (Pet. App. 21-34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2013. The petition for a writ of certiorari was filed on June 4, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal law creates several mechanisms through which the Secretary of Veterans Affairs assists veterans in developing claims for disability benefits. As a general matter, when a veteran seeks bene-

fits from the Department of Veterans Affairs (VA), the Secretary "shall make reasonable efforts to assist [the] claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. 5103A(a)(1); see 38 C.F.R. 3.103(a) (noting "obligation of VA to assist a claimant in developing the facts pertinent to the claim").

Federal law establishes more detailed standards for certain types of assistance. With respect to medical evaluations, "[i]n the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall 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). An examination or opinion is "necessary" when the record "contains competent evidence that the claimant has a current disability" that may be associated with military service but "does not contain sufficient medical evidence for the Secretary to make a decision on the claim." 38 U.S.C. 5103A(d)(2)(A), (B) and (C); 38 C.F.R. 3.159(c)(4).

Under the regulatory framework established by the VA, once a veteran's disability claim has been decided, a veteran may seek to reopen the VA's decision based upon new evidence and to either obtain a new benefits determination or seek further development of the record. 38 C.F.R. 3.156; see 38 U.S.C. 5108. The new evidence must be material in order to warrant reopening a claim. *Ibid.*

2. Petitioner, a veteran of the Vietnam War, filed a claim with the VA seeking benefits for Post-Traumatic Stress Disorder (PTSD). Pet. App. 2. The VA initial-

ly denied the claim. *Ibid.* After petitioner submitted additional evidence, however, the VA determined that petitioner had service-connected PTSD, which it rated as 30% disabling. *Ibid.*; see *id.* at 28. In later decisions, the VA increased petitioner's disability rating and modified the date of onset, ultimately concluding that petitioner was 30% disabled effective July 23, 1990, and was totally disabled due to unemployability as of January 1, 1994. *Id.* at 3.

Petitioner appealed to the Board of Veterans' Appeals (Board), seeking an earlier date of onset and a higher disability rating. The Board revised the date of onset for petitioner's disability to July 18, 1987, and it remanded the case to the VA regional office to determine petitioner's disability rating from that date forward. Pet. App. 3. The Board also directed the VA regional office to determine the date on which petitioner should be considered totally disabled due to unemployability. *Ibid.* To aid its assessment, the Board directed that the VA regional office should "consider whether the Veteran . . . should undergo a clinical evaluation and/or retrospective medical evaluation to ascertain the severity of PTSD since July 18, 1987." *Ibid.*

On remand, the VA regional office provided petitioner with a medical evaluation and made adjustments to petitioner's disability ratings. The regional office rated petitioner as 50% disabled as of the date of onset of his disability. Pet. App. 3, 56-61. It further determined that petitioner was entitled to a rating of total disability due to unemployability as of January 1, 1994. *Id.* at 49. Petitioner again appealed to the Board, seeking an earlier date of onset and higher disability ratings. *Id.* at 16; see *id.* at 3 n.1.

On March 11, 2011, while petitioner's appeal to the Board was pending, petitioner's attorney sent a letter to petitioner's VA treating physician, Dr. Martin Denker, requesting that Dr. Denker provide a supplemental evaluation and an opinion letter in order to assist petitioner in obtaining a higher disability rating and an earlier effective date. Pet. App. 3, 68-71. Enclosed with the letter were affidavits and medical records that petitioner had never submitted to the VA. *Id.* at 4. Petitioner's attorney asked Dr. Denker to review the materials himself and to supply a written opinion letter addressing specified questions concerning petitioner's diagnosis. *Id.* at 3-4; see *id.* at 68-71.

On April 8, 2011, an attorney for the VA advised petitioner that Dr. Denker would not provide the requested letter. The attorney explained (1) that determinations of "causality and disability ratings" are exclusively the function of the Veterans Benefits Administration, not treating physicians employed by the Veterans Health Administration; (2) that Veterans Health Administration physicians "do not have access to all relevant information" used in assessing disability claims; and (3) that opinions from treating physicians (as opposed to examining physicians) may present a conflict of interest. Pet. App. 72-73; see *id.* at 4.

On June 21, 2011, while petitioner's most recent appeal of his benefits determination was still pending before the Board, petitioner sought a writ of mandamus compelling the VA to order Dr. Denker to provide a retrospective medical opinion letter. Pet. App. 16. The Court of Appeals for Veterans Claims denied the petition. *Id.* at 16-20. The court noted that a writ of mandamus is a "drastic" remedy, "to be invoked only in extraordinary situations." *Id.* at 17 (quoting *Kerr* v.

United States Dist. Ct. for the N.D. of Cal., 426 U.S. 394, 402 (1976)). The court further explained that petitioner was required to show that he lacked adequate alternative means to obtain the desired relief; that he had a clear and indisputable right to the writ; and that the issuance of the writ was justified under the circumstances. *Id.* at 18.

The Court of Appeals for Veterans Claims determined that petitioner had failed to satisfy any of those requirements. The court found that petitioner had not shown a clear and indisputable right to the relief he sought because, although the VA is required to obtain "'a' medical opinion when 'necessary to make a decision on the claim,'" the statute "does not provide any right to a medical opinion from a VA physician of the petitioner's own choosing." Pet. App. 18 (quoting 38 U.S.C. 5103A(d)(1)). The court held that petitioner had also failed to show why an appeal to the Board would not provide an adequate alternative means of obtaining relief or why any special circumstance justified granting the writ of mandamus. *Id.* at 18-19.

3. The Court of Appeals for the Federal Circuit affirmed. Pet. App. 1-15. The court first concluded that it had jurisdiction over the petition. *Id.* at 6. In veterans-benefits cases, the Federal Circuit does not have jurisdiction over a "challenge to a law or regulation as applied to the facts of a particular case" unless the appeal "presents a constitutional issue." 38 U.S.C. 7292(d)(2)(B). The court below concluded that this jurisdictional limit was inapplicable here because petitioner's appeal from the denial of mandamus relief raised a question of law, not a question concerning the application of law to facts. Pet. App. 10.

On the merits, the court of appeals held that petitioner did not satisfy any of the requirements for mandamus relief. The court first found that petitioner had not demonstrated a clear right to a second medical opinion from a particular physician. Pet App. 11. The court noted that the relevant provisions of law do not "impose[] an open-ended obligation on the [VA] to provide a medical examination or opinion upon demand." *Ibid.* Rather, they require the VA "to provide a medical examination 'when such an examination . . . is necessary to make a decision on [a] claim.'" *Ibid.* (quoting 38 U.S.C. 5103A(d)(1)). Here, the VA had provided petitioner with a medical examination, and it was not indisputably clear that petitioner was also entitled to a second medical evaluation from the particular treating physician that petitioner had asked to assist him in seeking additional benefits. *Ibid.*

The court of appeals also determined that petitioner had failed to establish the absence of adequate alternative means to obtain relief. Pet. App. 11. On the contrary, the court noted, petitioner could use the ordinary appeals process for VA decisions to pursue his claim to a supplemental retrospective evaluation by a particular physician. *Id.* at 11-12.

Finally, the court of appeals concluded that petitioner had not shown any special circumstances that would justify granting the writ. Pet. App. 12. The court noted that, although granting the writ to petitioner would expedite the resolution of his claim, it would divert agency resources and thereby slow the resolution of claims by other veterans, who had adhered to the VA's normal review procedures. *Ibid.*

Judge Newman concurred in part and dissented in part. Pet. App. 13-15. She agreed that the court had

jurisdiction over the appeal, but concluded that the VA had breached its duty to assist by failing to provide the supplemental medical evaluation. *Ibid.* She would have granted the writ of mandamus. *Id.* at 15.[*]

ARGUMENT

The Federal Circuit's decision is correct and does not conflict with any decision of this Court or any other court of appeals. For a variety of reasons, moreover, this case would be an unsuitable vehicle for determining whether, and under what circumstances, a veteran who seeks disability benefits is entitled to a second medical opinion from a physician of his choice. Further review is not warranted.

1. The court of appeals correctly held that petitioner had not shown a clear and indisputable entitlement to a supplemental medical evaluation from a particular physician. Federal law requires the Secretary to "make reasonable efforts to assist a claimant" in obtaining evidence "necessary" to substantiate the claimant's claim for benefits. 38 U.S.C. 5103A(a)(1). With respect to medical evaluations, the assistance "shall include providing a medical examination or obtaining a medical opinion when such an examination

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[*] On January 9, 2012, while petitioner's appeal of the denial of his petition for mandamus was before the Federal Circuit, the Board granted petitioner's then-pending appeal of his disability determination in part, setting the effective date for petitioner's disability at May 13, 1985, and remanding petitioner's case to the VA regional office to identify the date as of which petitioner should be rated as totally disabled due to unemployability. Pet. App. 3 n.1. After the Federal Circuit's decision, the VA regional office determined that the existing date of petitioner's total disability rating should be left unchanged. Petitioner filed a notice of disagreement, and his appeal is currently pending before the Board.

or opinion is necessary to make a decision on the claim." 38 U.S.C. 5103A(d)(1). Here, petitioner received a medical evaluation to aid in developing his claim. No evidence in the record established that petitioner was clearly and indisputably entitled to a supplemental evaluation, let alone a supplemental evaluation from a particular physician of petitioner's choice. Accordingly, petitioner failed to show a clear and indisputable right to the relief he sought.

The additional authorities that petitioner cites do not add to the Secretary's obligations. Petitioner relies in part on a provision stating that "[t]he Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. 5103A(a)(2); see Pet. 17. But that provision identifies circumstances in which the Secretary is not obligated to perform an evaluation; it does not add to the circumstances in which an evaluation is required. And the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," see Pet. 14 (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991)), does not apply, because that canon applies only "if there is ambiguity in the statute," *McKnight* v. *Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (per curiam).

Contrary to petitioner's suggestion (Pet. 19), the decision below does not conflict with the Federal Circuit's own precedents. Petitioner cites decisions in which that court has stated that a claim should be fully developed before it is decided. *Ibid.* Those decisions, however, dealt not with the nature of the medical evaluation required, but with the manner in which disability claims should be construed and the standard

for reopening claims. See *Roberson* v. *Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) (holding that disability claims containing certain contentions should be understood to raise a claim of total disability based upon unemployability); *Hodge* v. *West*, 155 F.3d 1356, 1360, 1362 (Fed. Cir. 1998) (construing standard for reopening claims). The court of appeals has not previously considered whether the VA has a duty to provide a supplemental medical evaluation from a particular physician when requested. In any event, any conflict among the Federal Circuit's own decisions would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

2. Review is also unwarranted because the question presented is one of very limited importance. Because this case arises out of an appeal from the denial of mandamus relief, this Court's review would not necessarily produce a definitive resolution of the question whether the VA was legally obligated to provide the second opinion that petitioner requested. To establish his entitlement to mandamus relief, petitioner was required to demonstrate a "clear and indisputable" right to the second opinion he sought. See *Kerr* v. *United States Dist. Ct. for the N.D. of Cal.*, 426 U.S. 394, 403 (1976) (citation omitted). If this Court were to grant review, it might ultimately hold that petitioner failed to satisfy that requirement, without deciding whether the VA in fact breached its legal obligation. Indeed, the court of appeals itself took that course, holding that petitioner did not have a clear and indisputable right to a supplemental evaluation from his chosen physician, without definitively construing the

scope of the VA's statutory obligation to assist veterans in proving their claims. Pet. App. 11.

3. Even if some question concerning the scope of the VA's obligations in this context warranted this Court's review, this case would be a poor vehicle for resolving it. Petitioner continues to press a challenge to the VA's benefits determination before the Board, and he may seek through an ordinary appeal the supplemental medical evaluation that he sought through mandamus. See Pet. App. 11-12. This Court routinely denies petitions challenging interlocutory determinations that may be reviewed, together with any other claims that may have arisen in a petitioner's case, in a single petition for certiorari at the conclusion of the proceedings. See, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). And because alternative mechanisms for relief remain available, see Pet. App. 11-12, petitioner would not be entitled to mandamus relief even if he could show a clear entitlement to the second medical opinion that he requested. Petitioner's current involvement in VA appeal proceedings provides a further reason to deny review here, both because it highlights the current interlocutory posture of the case and because the availability of such proceedings bears directly on petitioner's eligibility for mandamus relief.

In addition, there is a significant question whether the court below had jurisdiction to entertain petitioner's appeal. In veteran's benefits cases, the Federal Circuit lacks jurisdiction over any "challenge to a law or regulation as applied to the facts of a particular case" except for constitutional challenges, 38 U.S.C.

7292(d)(2)(B); see Pet. App. 6. Any determination that petitioner had a clear and indisputable right to a supplemental medical evaluation would require an antecedent finding that such an evaluation was clearly "necessary" in petitioner's own circumstances, see 38 U.S.C. 5103A(d)(1), and that finding would depend on "the facts of a particular case," 38 U.S.C. 7292(d)(2)(B). This threshold jurisdictional question would be before this Court if it granted the petition, see, *e.g.*, *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 506 (2006), and might ultimately prevent this Court from reaching the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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