No. _____

IN THE
Supreme Court of the United States

BIRDEYE L. MIDDLETON,

Petitioner,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Schedule for Rating Disabilities establishes both disability ratings and rules that prescribe how those ratings must be applied to each veteran's unique circumstances. 38 C.F.R. ch. I, pt. 4. "In view of the number of atypical instances it is not expected" that each veteran "will show all the findings specified" for a given disability rating. *Id.* § 4.21. A veteran will therefore receive a higher rating if his "disability picture more nearly approximates the criteria required for that rating." *Id.* § 4.7. According to a new Federal Circuit rule, however, a veteran is ineligible for a higher rating if his disability picture "does not satisfy" all of the criteria required for that rating.

The question presented is:

Whether a veteran whose disability picture "more nearly approximates," 38 C.F.R. § 4.7, but "does not satisfy," the criteria required for a higher rating is ineligible for that higher rating.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Birdeye L. Middleton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of a split panel of the Federal Circuit is reported at 727 F.3d 1172 and reprinted at Pet.App.1a-18a. The order of the Federal Circuit denying rehearing en banc and Judge Newman's accompanying dissent are reported at 743 F.3d 1356 and reprinted at Pet.App.40a-46a. The opinion of United States Court of Appeals for Veterans Claims ("Veterans Court") denying Mr. Middleton's appeal is reprinted at Pet.App.19a-24a. The opinion of the Board of Veterans' Appeals denying in part Mr. Middleton's appeal is reprinted at Pet.App.25a-39a.

JURISDICTION

The Federal Circuit entered judgment on August 15, 2013. A timely petition for panel rehearing and rehearing en banc was denied on February 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 38 U.S.C. § 7292(c).

REGULATIONS INVOLVED

The Schedule for Rating Disabilities provides in pertinent part:

38 C.F.R. § 4.7 - Higher of two evaluations.

> Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned.
>
> 38 C.F.R. § 4.21 - Application of rating schedule.
>
> In view of the number of atypical instances it is not expected, especially with the more fully described grades of disabilities, that all cases will show all the findings specified. Findings sufficiently characteristic to identify the disease and the disability therefrom, and above all, coordination of rating with impairment of function will, however, be expected in all instances.

STATEMENT

This petition presents fundamental questions of veterans benefits law that affect most disability evaluations. The Schedule for Rating Disabilities ("Rating Schedule"), 38 C.F.R. ch. I, pt. 4, establishes hundreds of diagnostic codes for all manner of service-connected disabilities, ranging from a lost limb to post-traumatic stress disorder to diabetes. Both the Veterans Court and the Department of Veterans Affairs have long understood these diagnostic codes to be medical guides that must be flexibly applied to each veteran's unique disability picture. But the Federal Circuit recently created a new rule that converts these diagnostic codes into rigorous checklists that give dispositive effect to the absence of a single rating criterion.

This new rule upends the mathematical foundation of the Rating Schedule. Instead of

rounding to the nearest rating level, evaluators will now be required to always rounds down. This approach violates two fundamental principles that undergird the Rating Schedule: veterans are not expected to "show all the findings specified" in a rating level because patients do not usually present as textbook models of disease, 38 C.F.R. § 4.21; and veterans that fall in between two rating levels will receive the rating level that their disability picture "more nearly approximates." 38 C.F.R. § 4.7. But the Federal Circuit—in its first-ever interpretation of either regulation—discarded these principles in favor of its new rule that will always assign veterans a lower rating unless they satisfy *every* criteria required for a higher rating level.

This new rule is especially harmful to veterans because the Rating Schedule has failed to keep up with new medical techniques and diagnostic procedures. Indeed, it has been decades since many diagnostic codes were last revised. Section 4.7 provides veterans receiving newer medical treatments with a critical safety valve, by allowing them to seek rating levels that their disability pictures "more nearly approximate[]." The Federal Circuit's new rule nonetheless assigns controlling effect to any difference between these outdated diagnostic codes and the current medical treatments most veterans receive. Mr. Middleton, for example, was denied a higher rating level solely because he takes a different medication than specified at that level. Of course, the rating criteria do not mention Mr. Middleton's newer medication because that medication entered the market only after the relevant diagnostic code was last revised. Veterans

should not be forced to choose between current medical treatment and adequate disability compensation. The Federal Circuit's new rule erroneously places the cost of obsolete rating criteria entirely on veterans who are powerless to revise those criteria.

This new rule cannot be reconciled with the plain language of the Rating Schedule. Indeed, the Federal Circuit majority could justify its new rule only by relying on a crucially misquoted version of section 4.7. The majority's analysis turned on a distinction between general rating criteria and "required criteria" that are joined by a "conjunctive 'and.'" Pet.App.10a-11a. Applying this distinction, the majority concluded that section 4.7 has no effect "when a veteran does not satisfy all of the *required* criteria of the higher rating." Pet.App.10a (emphasis added). But that regulation states that a veteran will be assigned a higher rating level if her "disability picture more nearly approximates the criteria *required* for that rating." 38 C.F.R. § 4.7 (emphasis added). Thus, section 4.7 clearly provides that something approximating—but not satisfying—the required criteria of a higher rating level can suffice. The Federal Circuit's opinion inexplicably deletes the word "required" from section 4.7 and then assigns dispositive meaning to that same word. Pet.App.10a. The Federal Circuit has not yet fixed that clear error.

This Court's intervention is needed to correct these errors and restore the flexibility that medical experts intentionally incorporated into the architecture of the Rating Schedule. Otherwise, the Federal Circuit majority's erroneous new rule will

control every disability evaluation in the nation. As three Federal Circuit judges below recognized, that new rule contradicts both the plain language and foundational policies of the Rating Schedule. The Veterans Court has also held that the reasoning behind the Federal Circuit's rule would "eviscerate the meaning" of sections 4.7 and 4.21. But only this Court can reverse the Federal Circuit majority's atextual interpretation and restore flexibility to the disability evaluation process. That flexibility is required by the plain language of the Rating Schedule and this Court's long-standing rule that the nation's laws should be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

A. Statutory and Regulatory Background

Congress has ordered the Secretary of Veterans Affairs to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries." 38 U.S.C. § 1155. These ratings must establish no more than ten grades of disability, ranging from 10 percent to 100 percent, of the "average impairments of earning capacity resulting from such injuries." *Id.*

The Secretary has thus established the Rating Schedule. *See* 38 C.F.R. ch. I, pt. 4. Subpart B of the Rating Schedule provides hundreds of diagnostic codes for rating specific disabilities. *See id.* §§ 4.40-4.150. And Subpart A of the Rating Schedule establishes general policies that prescribe how the disability ratings in subpart B must be applied to individual veterans. *See id.* §§ 4.1-4.31.

These general policies require that the diagnostic codes be flexibly applied to each veteran's unique circumstances. The Rating Schedule "is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service." 38 C.F.R. § 4.1. Although the "percentage ratings represent as far as can practicably be determined the average impairment in earning capacity," *id.*, "it is not expected, especially with the more fully described grades of disabilities, that all cases will show all the findings specified," *id.* § 4.21. Thus, when applying the Rating Schedule, "accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition", *id.* § 4.1, because "coordination of rating with impairment of function will . . . be expected in all instances," *id.* § 4.21.

The Rating Schedule prescribes that when a veteran does not "show all the findings specified" for a given rating level, *id.* § 4.21, the veteran will be assigned the rating level that her disability picture "more nearly approximates," *id.* § 4.7. Thus, it has long been understood that a veteran "need not conclusively satisfy all the criteria within the letter of [an] applicable [diagnostic code] rating provision in order to establish entitlement" to that rating. *Jones v. Principi*, 3 Vet. App. 396, 401 (1992) (citing sections 4.7 and 4.21). Instead, "[j]udgment and flexibility are required in the evaluation process, since patients do not commonly present as textbook models of disease, and those evaluating disabilities always have the task of assessing which evaluation level best represents the overall picture. (*See* 38

C.F.R. 4.7)." Schedule for Rating Disabilities, 61 Fed. Reg. 20440, 20440 (May 7, 1996).

Although a veteran need not show *all* the findings specified for a given rating level, 38 C.F.R. § 4.21, the Veterans Court has held that a veteran cannot qualify for a higher rating level unless the veteran shows at least *some* of the findings unique to higher rating levels. Thus, the Veterans Court has rejected a veteran's attempt to use section 4.21 to qualify for a higher rating level when the veteran showed only findings associated with lower rating levels. *Camacho v. Nicholson*, 21 Vet. App. 360, 366-367 (2007). Otherwise, according to the Veterans Court, the lower rating level would become "meaningless." *Id.* at 367. Although the Veterans Court in *Camacho* also reasoned that the conjunctive nature of the higher rating criteria rendered every such criterion mandatory, *id.* at 366, the Veterans Court subsequently rejected that reasoning because it would "eviscerate the meaning" of sections 4.7 and 4.21. *Tatum v. Shinseki*, 23 Vet. App. 152, 155-156 (2009). Thus, the veteran in *Tatum* was able to seek a higher rating under section 4.7 despite establishing only "two of the three [conjunctive] criteria" required for that rating. *Id.* at 156.

B. Mr. Middleton's Service-Connected Diabetes

After more than a quarter century of active duty service, Mr. Middleton developed diabetes connected to his military service. Pet.App.2a. Mr. Middleton was initially able to manage his diabetes with restricted diet and oral medication, thereby warranting a 20% disability rating. *See*

Pet.App.2a,30a-32a; 38 C.F.R. § 4.119, Diagnostic Code 7913 ("DC 7913"). Mr. Middleton's condition progressively worsened to the point that he also needed to inject medication and regulate his daily activities in order to control his diabetes. Pet.App.32a-33a. Based on this deterioration, Mr. Middleton sought an increased disability rating at the 40% level based on the following underlined criteria:

Evaluation	Rating Criteria – DC 7913
40%	Requiring insulin, restricted diet, and regulation of activities
20%	Requiring insulin and restricted diet, or; oral hypoglycemic agent and restricted diet

Because Mr. Middleton's diabetes requires "regulation of activities"—a finding that DC 7913 associates only with ratings at or exceeding 40%—his disability picture is clearly more severe than the 20% level. But Mr. Middleton does not readily meet all criteria for the 40% level because he does not take insulin injections to control his diabetes. Pet.App.33a. Mr. Middleton instead injects Byetta®, which causes his body to secrete additional insulin. Pet.App.2a,33a.

Byetta® is one of several new classes of drugs that have driven a "revolution in the treatment" of diabetes since 1995. Shlomo Melmed *et al.*, *Williams Textbook on Endocrinology* 1410 (12th ed. 2011). None of these new drugs have been incorporated into DC 7913, which was last updated in 1993. *See* Schedule for Rating Disabilities, 58 Fed. Reg. 5691,

5693 (Jan. 22, 1993) (proposing revisions to DC 7913); Schedule for Rating Disabilities, 61 Fed. Reg. at 20443-45 (finalizing the 1993 proposed revisions).

C. Proceedings Below

1. In October 2008, Mr. Middleton sought an increase in his diabetes disability rating from a 20% rating level to a 40% rating level based on his worsening diabetes. Pet.App.2a, 30a. The Regional Office in Columbia, South Carolina denied his claim because he did not take insulin injections.

2. Mr. Middleton appealed the Regional Office's decision to the Board of Veterans' Appeals in December 2009. Pet.App.33a. The Board found that Mr. Middleton "follows a restricted diet and has regulated activities"—two of the three criteria associated with a 40% rating level under DC 7913. *Id.* The Board nonetheless held that Mr. Middleton could not qualify for the 40% rating because "[u]se of insulin is a necessary element for the 40 percent rating; the fact that the Veteran has not been required to use insulin thus precludes his being assigned this increased rating." *Id.* The Board disregarded Mr. Middleton's use of Byetta®, stating that "while Byetta is a medication used to control diabetes, it is not insulin." *Id.* At no point did the Board consider whether Mr. Middleton's disability picture "more nearly approximates" the 40% rating level, as required by 38 C.F.R. § 4.7.

3. In December 2010, Mr. Middleton appealed the Board's decision to the Veterans Court on the ground that he was denied an adequate evaluation under 38 C.F.R. § 4.7 over whether his diabetes more closely approximates the 40% rating level. Pet.App.24a.

Judge Lance of the Veterans Court denied his appeal in an unpublished decision. Pet.App.19a. Judge Lance reasoned that Mr. Middleton's appeal must be rejected because the Veterans Court had already held that "an appellant could not be rated 40% disabling, when he only satisfied two of the criteria of the 40% rating" in *Camacho*, 21 Vet. App. at 366. Pet.App.24a.

4. In November 2012, Mr. Middleton appealed that decision to the Federal Circuit based on the argument that Judge Lance's expansive reading of the *Camacho* decision conflicted with the plain language of sections 4.7 and 4.21. *See* Pet.App.8a. Mr. Middleton argued that, unlike the veteran in *Camacho*, he exhibited a rating criterion ("regulation of activities") found only at higher rating levels, thus plainly creating "a question as to which of two evaluations shall be applied" under section 4.7. A split panel of the Federal Circuit denied Mr. Middleton's appeal on August 15, 2013. Pet.App.1a.

Writing for the majority, Judge Lourie reasoned the three rating criteria at the 40% rating level for DC 7913 are "required criteria" joined by "the conjunctive 'and.'" Pet.App.10a-11a. Judge Lourie thus concluded that section 4.7 did not apply to Mr. Middleton's situation, explaining:

> As a matter of regulatory interpretation, however, the plain language of § 4.7 provides that the higher of two evaluations will be assigned only "[w]here there is a question as to which of two evaluations shall be applied." But there is no question as to which evaluation shall be applied when a veteran does not satisfy all of the

> *required* criteria of the higher rating but does satisfy all of the criteria of the lower rating.

Pet.App.10a (emphasis added). The Secretary of Veterans Affairs did not request that interpretation of section 4.7. And the Secretary could not have requested that interpretation because it only makes sense under the incorrect version of section 4.7 quoted in the Federal Circuit's opinion, which states:

> Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the [veteran's] disability picture more nearly approximates the criteria [~~required~~] for that rating.

Pet.App.10a. The Federal Circuit's opinion thus excises the word "required" from that regulation, and then focuses its analysis on that very same word. *See id.*

Judge Lourie also reasoned that section 4.7 should not apply to diagnostic codes like DC 7913 that "are part of a structured scheme of specific, successive, cumulative criteria for establishing a disability rating." Pet.App.11a. But Judge Lourie could not identify any textual or structural basis for exempting "successive" diagnostic codes from the general policies contained in Subpart A of the Rating Schedule, including sections 4.7 and 4.21. And Judge Lourie's new rule stating that section 4.7 does not apply to veterans missing any "required criteria" stands independent and apart from his analysis on the "successive" nature of DC 7913. *See* Pet.App.10a.

Judge Plager dissented from the panel decision because it departed from "two foundational concepts" built into the Rating Schedule. Pet.App.13a. First, Judge Plager recognized that the "medical experts who designed" the Rating Schedule created a medical "guide"—not a set of "rigid" codes—because "different people with the same illness do not always present the same symptoms, and . . . different people with the same illness do not always respond in the same way to the same drugs." *Id.* (citing 38 C.F.R. § 4.1). Thus, those medical experts required that the Rating Schedule "be interpreted broadly and in a manner that is veteran friendly." *Id.* (citing 38 C.F.R. § 4.3).

Second, "because even using their best efforts," those medical experts "could not anticipate the many ways that illnesses present, nor could they anticipate changes in treatment that new drugs might support," they mandated the general policy contained in section 4.7. *Id.* In Judge Plager's view, that regulation "honors substance over form" by assigning veterans higher ratings when their disability pictures "more nearly approximate[]" the criteria required for those ratings. Pet.App.16a-17a. But by requiring "verbal compliance with the words of the guideline," the majority's interpretation deprives section 4.7 of any meaning. Pet.App.15a. That "offends the general policies and procedures understood by the medical profession" by "snatch[ing] away the flexibility" built into the Rating Schedule and instead handing evaluators "a clipboard with a checklist." Pet.App.17a.

5. Mr. Middleton filed a timely petition for panel rehearing and rehearing en banc, which the Federal Circuit denied on February 3, 2014. Pet.App.40a.

In an opinion joined by Judge Wallach, Judge Newman dissented from that denial. Judge Newman criticized the majority for adopting a "new judge-made rule that was not presented by the government" on appeal and that "contradicts the foundational policies of veterans law." Pet.App.42a-43a. That new "bright-line rule" "discards the flexibility of 'more nearly approximates'" under section 4.7, so that "the absence of even one of the listed criteria leaves 'no question' that the lower rating must be applied." *Id.* But, as Judge Newman recognized, "[t]he criteria are medically-derived guidelines, not rules of law, for §4.7 recognizes that precise correlations are not always present." *Id.* "The court's new interpretation imposes a rigorous rule that does not accommodate individual, case-specific variation," thus "negat[ing] not only the letter but also the policy of the regulations." Pet.App.43a-44a.

Judge Plager also dissented from the panel's decision to deny rehearing[1] and corresponding "failure" to "self-correct . . . the clearly erroneous position taken in the majority opinion." Pet.App.46a. The Federal Circuit has still not corrected the incorrect version of section 4.7 in its now-precedential opinion.

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[1] As a judge in senior status, Judge Plager was not permitted to participate in the Federal Circuit's decision over whether to rehear the case en banc. Pet.App.40a,46a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Cannot Be Reconciled With The Regulatory Text, This Court's Precedents, or The Secretary's Previous Interpretations.

1. The Federal Circuit's new rule mandates what the plain text of the Rating Schedule forbids. In holding that veterans must show *every* finding specified at a higher rating level, the Federal Circuit runs afoul of 38 C.F.R. § 4.21. Under the heading "Application of the rating schedule," section 4.21 requires that "[i]n view of the number of atypical instances it is not expected, especially with the more fully described grades of disabilities, that all cases will show all the findings specified." The Federal Circuit's opinion does not even attempt to explain how its new rule is consistent with section 4.21. *See* Pet.App.8a-12a.

Instead, the majority opinion below focuses on the meaning of the word "and" found in DC 7913. The majority reasoned that they "must give meaning to the 'and' in the higher evaluation" of DC 7913 in order "[f]or the distinction between the ratings in this successive code to have any significance." Pet.App.11a. Thus, the majority concluded that the use of the "conjunctive 'and'" made all three criteria "required" so that "a veteran must satisfy" every criteria "to warrant such a rating." Pet.App.10a-11a.

Of course, all three criteria are "required" in the sense that they are conjunctive rather than disjunctive criteria. Thus, a veteran cannot qualify for the 40% rating level simply through establishing one of the three criteria without anything more. But

simply labeling the criteria as "required criteria" overlooks the key question presented in Mr. Middleton's appeal: how should a diagnostic code with "required criteria" be applied to veterans that do not present as textbook models of disease?[2] The plain language of section 4.7 states that such a veteran will be assigned a higher rating level if his "disability picture more nearly approximates the criteria required for that rating."

But the Federal Circuit ignored the plain meaning of section 4.7 because it instead applied the following misquoted version of that regulation:

> Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the [veteran's] disability picture more nearly

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[2] Neither of the Federal Circuit opinions cited by the majority addressed this question. Although *Watson v. Dep't of the Navy*, 262 F.3d 1292, 1299 (Fed. Cir. 2001) and *Boyle v. Nicholson*, 233 Fed. App'x 984 (2007) (unpublished) stand for the uncontroversial proposition that the word "and" is conjunctive, neither opinion addressed or even cited 38 C.F.R. §§ 4.7 or 4.21. *Watson* gives only general guidance on the meaning of the conjunction "and," 262 F.3d at 1299, and was focused on regulations in Title 5, which have no relation to the general rating policies set forth in 38 C.F.R. ch. I, pt. 4, subpart A.

Although *Boyle* addressed Diagnostic Code 7913, that decision "says nothing of § 4.7, nor does *Boyle* discuss § 4.7's application to DC 7913." Pet.App.18a. *Boyle* is an unpublished opinion arising from an appeal in which the veteran proceeded *pro se*. 233 Fed. App'x at 984. There is no reason to believe that the veteran cited either sections 4.7 or 4.21. And there is no reason to believe that the *Boyle* panel considered the general rating policies contained in these sections when it issued its non-precedential decision.

> approximates the criteria [~~required~~] for that rating.

Pet.App.10a. Using that incorrect version of the regulation, the Federal Circuit concluded that section 4.7 was unavailable because "there is no question as to which evaluation shall be applied when a veteran does not satisfy all of the *required* criteria of the higher rating but does satisfy all of the criteria of the lower rating." *Id.* (emphasis added). But that analysis crumbles under the actual text of section 4.7, which anticipates that a question will arise "as to which of two evaluations shall be applied" when a veteran's disability picture "more nearly approximates"—but does not satisfy—the "criteria required" for a higher rating.

The effect of the Federal Circuit's new rule is staggering. As three Federal Circuit judges recognized, the majority's new rule transforms a flexible, veteran-friendly disability system to one that requires strict "verbal compliance" with "rigorous rule[s]" and that lets the "absence of even one of the listed criteria" control the outcome of a disability evaluation. Pet.App.15a,43a-44a. In the Federal Circuit's first-ever interpretation of sections 4.7 or 4.21,[3] the majority opinion below adopted a construction that the much-more-experienced Veterans Court held would "eviscerate the meaning"

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[3] A Westlaw search of all Federal Circuit opinions in the CTAF database for the query "(4.7 4.21) and vetera!" reveals that—other than decisions in this case—the Federal Circuit has never even cited 38 C.F.R. § 4.21 and has only once cited, without interpreting, 38 C.F.R. § 4.7. *See Sellers v. Principi*, 372 F.3d 1318, 1326 (Fed. Cir. 2004).

of those regulations. *Tatum*, 23 Vet. App. at 155-156 (rejecting the Secretary's argument that "the presence of the conjunctive 'and' joining particular rating criteria within a [diagnostic code] requires that all of those rating criteria must be met to establish entitlement to the corresponding disability rating").

Thus, the opinion below manages to fundamentally restructure the Rating Schedule by applying a crucially misquoted version of one regulation (§ 4.7) and essentially ignoring the plain language of another regulation (§ 4.21). This Court's intervention is needed to correct these grave errors and restore flexibility to the veterans benefits system.

2. This Court has long applied the canon that "'provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221, n.9 (1991)). And the Department of Veterans Affairs has "a defined and consistently applied policy . . . to administer the law under a broad interpretation" and resolve any "reasonable doubt [that] arises regarding the degree of disability . . . in favor of the claimant." 38 C.F.R. § 4.3. But the Federal Circuit's new rule adopts an exceedingly narrow interpretation based on an artificial distinction between general rating criteria and "required criteria." That interpretation harms veterans by forcing them to present textbook disability ratings, instead of "more nearly approximat[ing]" those ratings, as allowed by section 4.7.

3. The Federal Circuit's new rule also conflicts with the Secretary's previous interpretations of section 4.7. In adopting the last revision of DC 7913, the Secretary explained that "[j]udgment and flexibility are required in the evaluation process, since patients do not commonly present as textbook models of disease, and those evaluating disabilities *always* have the task of assessing which evaluation level best represents the overall picture. (*See* 38 CFR 4.7.)." Schedule for Rating Disabilities, 61 Fed. Reg. at 20440 (emphasis added). Thus, contrary to the majority's interpretation below, the Secretary has prescribed that evaluators are always tasked with assigning the "evaluation level [that] best represents the overall picture." The Federal Circuit's new rule deprives evaluators of the flexibility offered by section 4.7 by forcing them to assign a lower rating level whenever a veteran deviates from the textbook model of disease found in a higher rating level's conjunctive criteria.

Thus, the Federal Circuit's new rule cannot be reconciled with the plain text of sections 4.7 and 4.21, this Court's precedents, or the Secretary's previous interpretations of the Rating Schedule.

4. The Federal Circuit also reasoned that section 4.7 was unavailable to Mr. Middleton due to the "successive" and "cumulative" nature of DC 7913. Pet.App.10a-12a. But there is absolutely no textual basis in the Rating Schedule for exempting diagnostic codes with "successive" or "cumulative" rating criteria from the general rules, like sections 4.7 or 4.21, that apply to all other diagnostic codes. And because those regulations are contained in Subpart A of the Rating Schedule, which is titled

"General Policy in Rating," the structure of the Rating Schedule requires that sections 4.7 and 4.21 apply to *all* diagnostic codes.

This atextual "successive" and "cumulative" distinction first arose in the Veterans Court's 2009 *Tatum* decision as a way for that court to distinguish some earlier erroneous reasoning in its 2007 *Camacho* decision. *See* 23 Vet. App. at 155-156. As explained below, the Federal Circuit has turned the Veterans Court's atextual distinction into an exception that swallows the rule of section 4.7.

The Veterans Court has consistently held that part of its *Camacho* decision was correct. In *Camacho*, a veteran sought a 40% rating for diabetes, even though his disability picture showed only findings associated with the 20% rating level: insulin and a restricted diet. 21 Vet. App. at 361. The Board evaluated his medical evidence and determined that he did not require "regulation of activities," which is the only criterion found at the 40% level that is not found at the 20% rating level. *Id.* at 362. Thus, the veteran presented a disability picture that showed the following underlined criteria:

Evaluation	Rating Criteria – DC 7913
40%	<u>Requiring insulin</u>, <u>restricted diet</u>, and regulation of activities
20%	<u>Requiring insulin</u> and <u>restricted diet</u>, or; oral hypoglycemic agent and restricted diet

Id. The Veterans Court rejected the veteran's argument that he could qualify for the 40% rating

level under section 4.21, reasoning that "if taking insulin and having a restricted diet were sufficient to support a 40% disability rating without restriction of activities, then there would be no reason for 'insulin and restricted diet' to be one of the two ways to qualify for a 20% disability rating." *Id.* at 366-367.

But the Veterans Court has also rejected some of the reasoning contained in its earlier *Camacho* decision. In *Camacho*, the Veterans Court reasoned that "[i]n light of the conjunctive 'and' in the criteria for a 40% disability rating under DC 7913, all criteria must be met to establish entitlement to a 40% rating." *Id.* at 366. While that reasoning was used to distinguish section 4.21, the *Camacho* decision did not interpret or even consider section 4.7. Just two years later, in *Tatum*, a veteran sought a higher rating level under section 4.7, when she established two of the three conjunctive criteria required for that rating level. 23 Vet. App. at 155-156. The Secretary argued that section 4.7 was unavailable to the veteran because, under *Camacho*, "the presence of the conjunctive 'and' joining particular rating criteria within a [diagnostic code] requires that all of those rating criteria must be met to establish entitlement to the corresponding disability rating." *Id.* The Veterans Court emphatically rejected the Secretary's position because it would "eviscerate the meaning" of sections 4.7 and 4.21. *Id.* Thus, the Veterans Court in *Tatum* limited *Camacho* to its "specific circumstances." *Id.* at 156.

In describing those circumstances, *Tatum* explained that *Camacho* was limited to circumstances involving "successive rating criteria."

Id. at 155-156. By that, *Tatum* meant that "the evaluation for each higher disability rating included the criteria of each lower disability rating, such that if a component was not met at any one level, the veteran could only be rated at the level that did not require the missing component." *Id.* at 156. And it is certainly true that each higher rating level in DC 7913 adds an additional rating criterion not found at the preceding level. *See* 38 C.F.R. § 4.119. And it is also true that a veteran missing that additional rating criterion would usually be limited to the preceding rating level. But the textual reason for why that veteran would be limited to the preceding level is not because DC 7913 is successive, cumulative, or any other adjective. The textual reason is instead found in section 4.7. Without the additional rating criterion unique to higher levels, there would not be "a question as to which of two evaluations shall be applied" to the veteran's disability. *See* 38 C.F.R. § 4.7.

But the majority opinion below goes too far in expanding the "successive" and "cumulative" distinction to cover all possible diabetes disability pictures. Unlike the veteran in *Camacho*, Mr. Middleton is not missing the additional rating criterion that distinguishes a higher rating level from the preceding level. The Board confirmed that Mr. Middleton requires "regulation of activities," a criterion associated only with evaluations at or exceeding the 40% rating level in DC 7913. Pet.App.33a. Because Mr. Middleton's disability picture shows findings associated only with higher rating levels, the question clearly arises as to whether the higher rating level is a more appropriate

rating under section 4.7. This is confirmed by *Tatum*.

In *Tatum*, the veteran suffered from hypothyroidism, 38 C.F.R. § 4.119, DC 7903, with the below underlined criteria:

Evaluation	Rating Criteria - DC 7903
30%	Fatigability, constipation, and mental sluggishness
10%	Fatigability, or; continuous medication required for control

23 Vet. App. at 154. The Veterans Court held that "[b]ecause fatigability and mental sluggishness are two of the three criteria listed for a 30% disability rating, the question clearly arises as to whether a 30% disability is more appropriate than a 10% disability rating, which requires only fatigability. Accordingly, § 4.7 is necessarily implicated in this case." *Id.* at 156. Otherwise, the "conclusion that § 4.7 is not for application when the criteria for higher disability ratings are variable, and not simply cumulative, would eviscerate the meaning of section 4.7." *Id.*

But the Federal Circuit's harsh new rule effectively overrules *Tatum* by holding that section 4.7 is unavailable when rating criteria are joined by a conjunctive "and." Pet.App.11a. That is the very reasoning that the Veterans Court rejected in *Tatum*. 23 Vet. App. at 155. Although the majority below ignored that holding in *Tatum* because it was "not bound by a decision of the Veterans Court," Pet.App.10a, the Federal Circuit is bound by the

actual text of section 4.7. And the actual text of that regulation forbids the majority's interpretation.

The Federal Circuit's new bright-line rule is not limited to diagnostic codes with "successive" rating criteria. Instead—absent this Court's intervention—any diagnostic code using a conjunctive "and" to join rating criteria will become a rigorous checklist depriving veterans of the flexibility intentionally built into the Rating Schedule with sections 4.7 and 4.21. That construction violates the Secretary's own mandate to "administer the law under a broad interpretation" and resolve any "reasonable doubt [that] arises regarding the degree of disability . . . in favor of the claimant." 38 C.F.R. § 4.3. It also violates the canon, long applied by this Court, that the nation's laws should be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold*, 328 U.S. at 285.

II. The Federal Circuit's Erroneous Resolution Of The Exceptionally Important Question Presented Threatens Veterans Throughout The Nation.

1. The Federal Circuit's new rule fundamentally changes the nature of the disability evaluation process for veterans. Under that rule, the mere presence of the word "and" will force veterans to meet a textbook model of disease.[4] And the Veterans

[4] Many diagnostic codes use a conjunctive "and" to join rating criteria. For example, of the eleven diagnostic codes in 38 C.F.R. § 4.119 with staged ratings, eight out of eleven contain rating evaluations that use the conjunction "and." 38 C.F.R. § (continued…)

Court has already begun to apply that erroneous new rule even to non-successive diagnostic codes lacking a conjunctive "and."[5] But hundreds of diagnostic codes were drafted with the understanding that "it is not expected . . . that all cases will show all the findings specified." 38 C.F.R § 4.21. By changing the paradigm under which these diagnostic codes will be applied, the Federal Circuit's erroneous new rule will have profound effects on veterans throughout the nation.

The effects of this erroneous new rule are exacerbated by the outdated nature of many rating criteria. The Rating Schedule is "out of date and incongruous with current medical knowledge and practices in describing disabilities." Veterans' Disability Benefits Commission, *Honoring the Call to Duty: Veterans' Disability Benefits in the 21st Century* 374 (Oct. 2007). It has been decades since

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4.119 (Diagnostic Codes 7900, 7901, 7903, 7904, 7907, 7908, 7909 and 7913 use the conjunction "and" in a manner similar to the 40% rating level in Diagnostic Code 7913).

[5] The Veterans Court has repeatedly applied the Federal Circuit's new judge-made rule that "there is no question as to which evaluation shall be applied when a veteran does not satisfy all of the required criteria of the higher rating but does satisfy all of the criteria of the lower rating" to non-successive diagnostic codes that lack conjunctive criteria. *See, e.g.*, *Mancias v. Shinseki*, No. 13-1560, 2014 WL 1410367, at *1 (Vet. App. Apr. 14, 2014) (applying it to the disjunctive criteria of DC 6502 for deviated nasal septum, 38 C.F.R. § 4.97); *Gallo v. Shinseki*, No. 13-116, 2014 WL 1400762, at *3 (Vet. App. Apr. 11, 2014) (applying it to the non-successive criteria of DC 5284 for foot injuries, 38 C.F.R. § 4.71a); *Bearden v. Shinseki*, No. 12-1878, 2014 WL 54667, at *5 (Vet. App. Jan. 8, 2014) (applying it to the non-successive criteria of DC 7336 for hemorrhoids, 38 C.F.R. § 4.114).

most diagnostic codes were last revised, and the Federal Circuit's strict new rule forces veterans to meet every single outdated criteria.

2. The Federal Circuit's strict new rule is not one that the Secretary could adopt on his own. Were the Secretary to now adopt the Federal Circuit's interpretation of section 4.7 that "there is no question as to which evaluation shall be applied when a veteran does not satisfy all of the required criteria of the higher rating but does satisfy all of the criteria of the lower rating," Pet.App.10a, the Secretary would not be entitled to *Auer* deference because the interpretation is clearly "'inconsistent with the regulation.'" *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 461-462 (1997)). Moreover, such a new interpretation would conflict with the Secretary's past interpretation of section 4.7 as requiring disability evaluators to "*always* have the task of assessing which evaluation level best represents the overall picture." Schedule for Rating Disabilities, 61 Fed. Reg. at 20440 (emphasis added).

Were the Secretary to propose revisions to section 4.7, those revisions would be subject to public notice and comment. It would be difficult for the Secretary to revise section 4.7 without also at least updating the hundreds of diagnostic codes promulgated under the existing version of section 4.7. And any such revision would be subject to judicial review under 38 U.S.C. § 502. Indeed, Congress recently expanded the availability of judicial review of the Secretary's actions in the Veterans' Benefits Improvements Act of 2008, Pub. L. No. 110-389, § 102, 122 Stat. 4145, 4148 (2008) (amending 38 U.S.C. § 502). Congress

implemented this change because a "number of recent reports . . . ha[d] noted the need to update obsolete sections of VA's rating schedule. Without a change to [then-]current law, any changes to the rating schedule would [have been] shielded from judicial review." S. Rep. No. 110-449, at 13 (2008), *reprinted in* 2008 U.S.C.C.A.N. 1722, 1735.

The nation's veterans deserve better than the Federal Circuit's erroneous new rule. Disability evaluators in regional offices throughout the country already perform "accurate and fully descriptive medical examinations . . . with emphasis upon the limitation of activity imposed by the disabling condition." 38 C.F.R. § 4.1. And those evaluators review all medical evidence that veterans submit in support of their claims. Instead of reviewing that medical evidence under the Federal Circuit's new rigorous checklist approach, those evaluators should be freed to determine which evaluation level best represents a veteran's overall disability picture.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] Like any disability evaluation, these determinations would be appealable to the Board of Veterans' Appeals. The Board's decisions would be subject to limited review by the Veterans Court under a "clearly erroneous" standard. Pet.App.20a (citing 38 U.S.C. § 7261(a)(4)). Absent a constitutional issue, the Veterans Court's ruling would be final. *See* Pet.App.10a (citing 38 U.S.C. § 7292(d)(2)).

Respectfully submitted,

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May 5, 2014

APPENDIX

Appendix A

United States Court of Appeals
Federal Circuit

BIRDEYE L. MIDDLETON,
Claimant-Appellant,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,
Respondent-Appellee.

No. 2013-7014.

Decided: August 15, 2013.

Before LOURIE, PLAGER, and TARANTO, Circuit Judges.

Opinion for the court filed by Circuit Judge LOURIE.

Dissenting opinion filed by Circuit Judge PLAGER.

LOURIE, Circuit Judge.

Birdeye L. Middleton appeals from the decision of the United States Court of Appeals for Veterans Claims (the "Veterans Court") affirming the decision of the Board of Veterans' Appeals (the "Board") denying a disability rating in excess of 20% for his service-connected diabetes. *See Middleton v. Shinseki*, No. 10-4222, 2012 WL 2180580 (Vet. App. June 15, 2012) (unpublished). Because the Veterans Court did not err in interpreting the governing

regulations and we lack jurisdiction to review the Veterans Court's application of the regulations to the facts, we affirm.

BACKGROUND

Middleton served on active duty from January 1964 to February 1990. He first sought compensation for his type II diabetes mellitus in October 2001. In July 2002, a Department of Veterans Affairs ("VA") Regional Office ("RO") granted service connection, assigning a disability rating of 20% pursuant to 38 C.F.R. § 4.119, Diagnostic Code ("DC") 7913. *See In re Middleton*, No. 05-15 604, slip op. at 5 (Bd. Vet. App. Aug. 27, 2010). Middleton sought an increased rating in 2008, which the RO denied in March 2009 after a VA physical examination. *Id.* Middleton filed a timely Notice of Disagreement, and the RO issued a Statement of the Case ("SOC") in December 2009. Id. Middleton then filed an appeal, and the RO issued a supplemental SOC in January 2010. *Id.*

In December 2009, the VA provided Middleton with a further physical examination that confirmed the diagnosis of type II diabetes mellitus. For that condition he was treated with three oral hypoglycemic agents and daily injections of the drug Byetta®. *Id.* at 6. Byetta® is a synthetic peptide that induces the body to secrete endogenous insulin. In August 2010, the Board again denied a rating increase despite Middleton's assertions that he met the criteria for a 40% rating on the grounds that his diet was restricted, his activities were regulated, and he used an oral hypoglycemic agent. *Id.*

The Board found that Middleton was only entitled to a 20% rating. It stated, "Though [Middleton] is on a restricted diet, has regulation of activities, and uses an oral hypoglycemic agent, he does not use insulin to regulate his diabetes." *In re Middleton*, No. 05-15 604, slip op. at 4. The Board further found that neither Middleton's VA treatment records nor records from his private physician mentioned that he required insulin, and that treatment records from January through June of 2008 specifically referred to him as a non-insulin dependent diabetic. *Id.* at 6-7.

The Board ultimately found that, while Byetta® is a medication used to control diabetes, it is not insulin, and therefore the medical evidence of record showed that Middleton did not require insulin. *Id.* at 7. The Board emphasized that the "[u]se of insulin is a necessary element for the 40-percent rating; the fact that [Middleton] has not been required to use insulin thus precludes his being assigned this increased rating." *Id.*

Middleton then appealed to the Veterans Court and again argued that he was entitled to a rating in excess of 20%. The court disagreed and affirmed the denial by the Board because medical evidence did not show that Middleton was prescribed insulin. *Middleton*, 2012 WL 2180580, at *2. Middleton argued that treatment with Byetta® injections was analogous to, yet admittedly not identical to, requiring insulin, but the court held that the plain language of DC 7913 recites "insulin" and does not include a supposed substitute. *Id.*

Middleton also argued that his diabetes was more closely related to the criteria for a 40% rating and that 38 C.F.R. § 4.7, which provides that the higher

of two evaluations will be assigned if the veteran's disability picture more nearly approximates the criteria required for that rating, was applicable to his claim. *Id.* at *3. The Veterans Court nevertheless held that § 4.7 did not apply because, following its own precedent in *Camacho v. Nicholson*, 21 Vet. App. 360 (2007), a veteran could not be rated at 40% for diabetes when he only satisfied two of the criteria for that rating, as did Middleton. *Id.*

This appeal followed.

DISCUSSION

Our jurisdiction to review decisions of the Veterans Court is limited by statute. 38 U.S.C. § 7292. We "have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof [by the Veterans Court] ... and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." *Id.* § 7292(c). We may not, however, absent a constitutional challenge, "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." *Id.* § 7292(d)(2). We therefore generally lack jurisdiction to review challenges to the Board's factual determinations or to any application of law to fact. *See, e.g.*, *Johnson v. Derwinski*, 949 F.2d 394, 395 (Fed. Cir. 1991). But we do have jurisdiction here to determine the proper interpretation of a regulation such as DC 7913. *See Amberman v. Shinseki*, 570 F.3d 1377, 1381 (Fed. Cir. 2009) (exercising jurisdiction over review of Veterans Court's interpretation of regulation with

rating schedule); *Forshey v. Principi*, 284 F.3d 1335, 1338 (Fed. Cir. 2002) (en banc).

Section 4.119 of the VA regulations sets forth a schedule of disability ratings for diseases of the endocrine system. *See* 38 C.F.R. § 4.119. Within that schedule, Diagnostic Code 7913 prescribes ratings for diabetes mellitus. *See id.*, DC 7913. The code recognizes five levels of disability, expressed in terms of percentages, which "represent as far as can practicably be determined the average impairment in earning capacity resulting from" the corresponding descriptions of a veteran's condition. *See* 38 C.F.R. § 4.1. The code reads as follows:

7913 Diabetes mellitus	
Requiring more than one daily injection of insulin, restricted diet, and regulation of activities (avoidance of strenuous occupational and recreational activities) with episodes of ketoacidosis or hypoglycemic reactions requiring at least three hospitalizations per year or weekly visits to a diabetic care provider, plus either progressive loss of weight and strength or complications that would be compensable if separately evaluated	100 [percent]
Requiring insulin, restricted diet, and regulation of activities with episodes of ketoacidosis or hypoglycemic reactions requiring one or two hospitalizations per year or twice a month visits to a diabetic care provider, plus complications	60 [percent]

that would not be compensable if separately evaluated	
Requiring insulin, restricted diet, and regulation of activities	40 [percent]
Requiring insulin and restricted diet, or; oral hypoglycemic agent and restricted diet	20 [percent]
Manageable by restricted diet only	10 [percent]

§ 4.119, DC 7913.

I.

Middleton maintains that the Veterans Court misinterpreted the "[r]equiring insulin" criterion of the 20% and 40% ratings in DC 7913 as requiring the direct administration of insulin. He asserts that the term refers more generally to a need for insulin, not a specific method of obtaining it, and that — even though he was not administered the substance insulin exogenously — he still "requires insulin" because he takes other medications such as Byetta® injections that cause his body to secrete insulin endogenously. Middleton argues that the court's interpretation limiting the regulation to require a prescription for a specific medication is inconsistent with the benefits scheme and regulatory history, which focus on the severity of the impairment and how well a veteran's diabetes is controlled. Moreover, he contends that interpretations of ratings that rely on specific medications rather than impairments become obsolete as new drugs are introduced; therefore, any ambiguity should be resolved in favor of referencing symptoms, *e.g.*, whether insulin is needed for control regardless whether it is directly

injected or endogenously created after administering a medication such as Byetta®. The Secretary argues that the plain language of DC 7913 unambiguously recites "[r]equiring insulin," which should be given its ordinary meaning and does not encompass using an insulin-inducing drug as analogous to using insulin.

We conclude that the Veterans Court did not err in interpreting DC 7913, as its plain language reciting the criterion "[r]equiring insulin" for each of the 20% and 40% ratings clearly requires that the veteran is administered insulin. *See Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997) ("To interpret a regulation we must look at its plain language and consider the terms in accordance with their common meaning.").

In contrast to the position taken by Middleton, the code does not authorize a 40% rating premised on the administration of another medical compound or pharmaceutical agent than the substance insulin, reserving that rating only for those circumstances "[r]equiring insulin, restricted diet, and regulation of activities." 38 C.F.R. § 4.119, DC 7913. The context of the code also demonstrates that, when the VA intended to specify treatment for diabetes with another substance, it identified such treatment directly. Specifically, a 20% rating provides for two possibilities: "[r]equiring insulin and restricted diet, or; oral hypoglycemic agent and restricted diet," which expressly distinguishes between treatment via administration of insulin and treatment via administration of an oral hypoglycemic agent. If, as Middleton asserts, those regulatory provisions are obsolete, then it is not for us to rewrite them.

As currently specified, "[r]equiring insulin" means being administered insulin. To read that criterion otherwise would be to ignore the plain language in the code that specifies alternative treatments: if requiring insulin does not mean administering insulin, then that criterion could arguably be satisfied by the alternative of administering an oral hypoglycemic agent or any other diabetes medication, and there would have been no reason for the Secretary to have expressly provided for such an alternative possibility. Accordingly, as a matter of interpretation, the Veterans Court did not err in holding that the "[r]equiring insulin" criterion of the 40% rating contemplated by DC 7913 means that the veteran must be administered insulin.

II.

Middleton also argues that the Veterans Court's holding that satisfaction of the requiring insulin criterion is a necessary finding for a 40% rating conflicts with 38 C.F.R. § 4.21, which provides that "it is not expected ... that all cases will show all the findings specified." Appellant Br. 5, 30-33. He therefore maintains that the Veterans Court erred in holding that 38 C.F.R. § 4.7, concerning application of the higher of two evaluations, does not apply to his entitlement claim for a rating in excess of 20% for his service-connected diabetes.

Middleton asserts that his disability status more nearly approximates the criteria required for the 40% than the 20% rating of DC 7913 because control of his diabetes requires regulation of activities, which is only associated with ratings equal to or

exceeding 40%. Middleton analogizes his situation to that of the claimant in *Tatum v. Shinseki*, 23 Vet. App. 152 (2009), which concerned an evaluation of the appropriate disability rating level for hypothyroidism under § 4.119, DC 7903. In that case, the Board initially determined that § 4.7 did not apply to the veteran's claim for entitlement to a 30% rating because it found that, although she had two of the three listed symptoms (fatigability and mental sluggishness), she did not suffer from the third requirement (constipation). Tatum, 23 Vet. App. at 154. The Veterans Court, however, held that § 4.7 was "necessarily... implicated," set aside the Board's decision, and remanded for further consideration whether a 30% rating was more appropriate than a 10% rating, which required only fatigability or control via continuous medication. *Id.* at 156.

The Secretary responds that DC 7913 is a successive and cumulative rating schedule, necessitating that to warrant a 40% rating, a veteran must satisfy all of the criteria for that rating. The Secretary argues that the plain language use of the conjunctive "and" means that the three elements associated with the 40% rating are mandatory, consistent with our holding in *Boyle v. Nicholson*, 233 Fed. Appx. 984 (Fed. Cir. 2007), and the Veterans Court's holding in *Camacho v. Nicholson*, 21 Vet. App. 360 (2007). The Secretary contends that, because control of Middleton's diabetes does not require insulin — one of the three mandatory elements associated with the 40% rating — the Veterans Court did not err in concluding that § 4.7 did not apply.

The regulation at issue provides as follows:

> Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the [veteran's] disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned.

38 C.F.R. § 4.7.

At the outset, we note that determining whether Middleton's disability status more nearly approximates the 40% rating rather than the 20% rating requires an application of law to fact that is beyond our jurisdiction, as there is no constitutional issue presented. 38 U.S.C. § 7292(d)(2); *Jackson v. Shinseki*, 587 F.3d 1106, 1109 (Fed. Cir. 2009).

As a matter of regulatory interpretation, however, the plain language of § 4.7 provides that the higher of two evaluations will be assigned only "[w]here there is a question as to which of two evaluations shall be applied." But there is no question as to which evaluation shall be applied when a veteran does not satisfy all of the required criteria of the higher rating but does satisfy all of the criteria of the lower rating. We thus conclude that the Veterans Court did not err in its analysis of the unavailability of § 4.7 as a matter of law in this case because Middleton did not meet the "[r]equiring insulin" criterion of the 40% rating, given its plain meaning of "being administered insulin."

Middleton's reliance on *Tatum* is misplaced. Aside from the fact that we are not bound by a decision of the Veterans Court, the Veterans Court itself distinguished *Camacho* in *Tatum*, recognizing that,

in contrast to hypothyroidism ratings under DC 7903, diabetes ratings under DC 7913 involve successive criteria. *Tatum*, 23 Vet. App. at 155-56. We agree that the enumerated elements of DC 7913 required for a 40% rating are part of a structured scheme of specific, successive, cumulative criteria for establishing a disability rating: each higher rating includes the same criteria as the lower rating plus distinct new criteria. For example, a 10% rating is warranted when a veteran's diabetes is "[m]anageable by restricted diet only." § 4.119, DC 7913. The restricted diet criterion is an element in each of the alternatives defining eligibility for the 20% rating, i.e., "[r]equiring insulin and restricted diet, or; oral hypoglycemic agent and restricted diet." *Id.* And satisfaction of the in-the-alternative criterion for the 20% rating is required to obtain the 40% rating, to which is added the elements "[r]equiring insulin" and "regulation of activities." *Id.*

As we held in *Boyle*, which we recognize was not precedential, use of the conjunctive "and" in the 40% rating of DC 7913 necessitates that there are three elements that a veteran must satisfy to warrant such a rating. *Boyle*, 233 Fed.Appx. at 987 (citing *Watson v. Dep't of the Navy*, 262 F.3d 1292, 1299 (Fed. Cir. 2001) (inclusion of conjunctive "and" in regulation indicated that all three enumerated criteria had to be demonstrated)). In contrast, the 20% rating uses the connector "or" to establish alternate factors. For the distinction between the ratings in this successive code to have any significance, we must give meaning to the "and" in the higher evaluation. Thus, because the 40% rating does not contemplate alternative considerations, a veteran must demonstrate all of the

required elements in order to be entitled to that higher evaluation.

Accordingly, we discern no error by the Veterans Court with respect to the unavailability of § 4.7 to Middleton's claim for a rating in excess of 20% when it concluded that he could not be rated 40% disabled because there was no question that the higher evaluation did not apply when he only satisfied two of the required elements.

CONCLUSION

We have considered Middleton's remaining arguments and conclude that they are without merit. Because the Veterans Court did not err in interpreting the governing regulations, we affirm.

AFFIRMED

COSTS

PLAGER, Circuit Judge, Dissenting.

The medical experts who designed the VA disability rating system for veterans with service-connected disabilities had no difficulty in understanding that different people with the same illness do not always present the same symptoms, and that different people with the same illness do not always respond in the same way to the same drugs. They wisely built two foundational concepts into the rating schedule to provide for these understandings.

First, they stated at the outset that: "This rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service." 38 C.F.R. § 4.1 (emphasis added). In case anyone should miss the point that a guide is not a rigid diagnostic code or a treatment prescription, they added that the rating schedule should be interpreted broadly and in a manner that is veteran friendly. *See* 38 C.F.R. § 4.3 (quoted in full below).

Then, because even using their best efforts they could not anticipate the many ways that illnesses present, nor could they anticipate changes in treatment that new drugs might support, they added a second caveat to the "General Policy in Rating":

> Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the [veteran's] disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned.

38 C.F.R. § 4.7.

In the case before us, the central issue is whether these foundational concepts apply to the rating schedule for diabetes mellitus. All agree that Mr. Middleton, who suffers from diabetes mellitus, has a compensable illness; the question is whether, under the rating guides in DC 7913, he is properly compensated at the 20% or 40% disability level. The record shows that his symptomology and his treatment regimen place him somewhere between the two descriptive guides for the two ratings; he does not fit squarely into either.

Mr. Middleton takes oral hypoglycemic agents, requires a restricted diet, regulates his activities, and receives daily injections of the drug Byetta®. He appears to meet all of the criteria for the 20% level, and all of the criteria for the 40% save one: insulin. Mr. Middleton argues that his Byetta injections are analogous to injections of insulin, thus putting him 'nearly approximate' to the 40% level. However that may be, and despite the majority's concern with all this, the facts of Mr. Middleton's particular case are irrelevant to the issue we must decide.

As the majority correctly notes, our question is not to which of these ratings Mr. Middleton is entitled. For us to determine whether Mr. Middleton satisfies every element of the 20% level and 'approximately' meets every element of the 40% level, or not, involves application of the law to the facts, which is beyond our jurisdiction under the peculiar standard of review Congress gave us over decisions of the Court of Appeals for Veterans Claims. Rather, the question of interpretation of VA law — over which we do have jurisdiction — is whether the foundational concepts

set out in the provisions of the rating schedule quoted above apply to DC 7913, structured as it is (and presumably other provisions structured like it[1]).

The Government argues that when there is a successive and cumulative rating schedule, as here, the veteran seeking the higher rating can only obtain it if the language of the higher rating does not have specific requirements for that rating; if it does, the veteran must meet the requirements in haec verba. But the standard in § 4.7 is "more nearly approximates the criteria for that rating," clearly providing that something approximating the criteria — not the criteria itself — is what to look for. If verbal compliance with the words of the guideline is what is required, § 4.7 has no meaning.

Recognizing the weakness in this argument, the Government couples it with the classic "read the statute" first argument. And it is certainly true that we judges spend much of our time interpreting statutes, seeking understanding of what the Congressional verbiage means by parsing the verbs and the nouns of a statute as if they contain some secret code that only we can penetrate. My colleagues, putting their interpretive skills to use, find in the stated rating schedule a controlling difference between the "and" in the 40% rating and the "or" in the 20% rating. Maj. Op. at 1178. "For the

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[1] *See* § 4.119 Schedule of ratings — endocrine system. In addition to the successive steps for 7913 Diabetes mellitus (5 steps), § 4.119 lists several other illnesses with successive steps, *e.g.*, 7900 Hyperthyroidism (4 steps); 7909 Diabetes insipidus (4 steps); and 7911 Addison's disease (3 steps).

distinction between the ratings in this successive code to have any significance, we must give meaning to the 'and' in the higher evaluation." *Id.* The fact that the syntax and punctuation surrounding the "or" in the lower evaluation guide makes little grammatical sense is of no moment — the truth is in the words, and in the "plain language" of the ratings guide.

With due respect, the verbal statements in this ratings schedule are, as the regulations themselves state, only guides; calling it "the code," as the majority frequently does, cannot change that fact. These are guides, not for the display of interpretive technique, but guides to what a sensible application of the two foundational concepts addresses. In a veteran-friendly system, what outcome is called for when the symptoms and prescribed treatment fall somewhere between the ratings, for example because a different drug — Byetta — is injected to treat the veteran's particular version of the illness rather than the standard drug — insulin, the one mentioned in the guide? Does that really turn on the difference between an "and" and a confusingly mistyped "or"? Should not the outcome instead respond to a commonsense analysis reflecting the illness and its treatment, and the purpose of a disability program for veterans who have honorably served their country?

I do not mean to say that the VA can begin its analysis of an application for benefits by setting aside criteria in the rating schedule. But if the VA's analysis reveals that the veteran's disability falls between two ratings, § 4.7 directs the VA to determine whether the disability picture more nearly

approximates the criteria for the higher rating. If it does, § 4.7 honors substance over form by awarding the veteran the higher rating. The medical experts who designed the system wanted it that way. Indeed, as the "General Policy in Rating" tells us, "[i]n view of the number of atypical instances it is not expected, especially with the more fully described grades of disabilities, that all cases will show all the findings specified." 38 C.F.R. § 4.21 (emphasis added). The argument that an illness with a "successive and cumulative rating schedule" is exempt from the ameliorative purposes of § 4.7 cannot be right. Nothing in DC 7913 suggests that the court should exempt it, or others like it, from § 4.7 and the clear policy of the ratings schedule.

Simply put, the majority's interpretation of § 4.7 is incorrect. The interpretation that it does not apply to provisions like DC 7913 offends the general policies and procedures understood by the medical profession. It snatches away the flexibility that the VA needs to battle the epidemic of diabetes and hands them a clipboard with a checklist. We should not hamper the VA's efforts to carry out their stated policy:

> It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant.

38 C.F.R. § 4.3.

The majority opinion cites a nonprecedential opinion for its legal support.[2] However mistaken its authority, there is little this dissent can do to correct the disservice of the decisional outcome in this veteran's case. Nevertheless, it is to be hoped that the majority's treatment of veteran's law generally will be given the same weight as their nonprecedential authority, and that it will not be followed in future cases as a correct understanding of the law applicable more broadly to other such cases.

I respectfully dissent.

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[2] *Boyle v. Nicholson*, 233 Fed. Appx. 984 (Fed. Cir. 2007). In addition to relying on a nonprecedential opinion as precedent contrary to the long-standing policy of the court, the *Boyle* opinion offers no support: *Boyle* says nothing of § 4.7, nor does *Boyle* discuss § 4.7's application to DC 7913. *Id.*

APPENDIX B

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 10-4222

BIRDEYE L. MIDDLETON, APPELLANT,

V.

ERIC K. SHINSEKI,

SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, Judge.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

LANCE, Judge: The appellant, Birdeye L. Middleton, through counsel, appeals an August 27, 2010, Board of Veterans' Appeals (Board) decision that denied his claim for a rating in excess of 20% for diabetes mellitus. Record (R.) at 3-14. Initially, the Court notes that it lacks jurisdiction over the claim for entitlement to service connection for a heart condition, to include mitral valve prolapse or a cardiac disorder manifested by chest pain, that was remanded and it will not be addressed further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm the August 27, 2010, decision.

I. ANALYSIS

A. Disability Rating in Excess of 20%

The appellant argues that he is entitled to a a rating in excess of 20% for diabetes mellitus. Appellant's Brief (Br.) at 5-15.

A Board determination of the appropriate degree of disability under the rating code is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet. App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *Id.*

The Board must provide a written statement of the reasons or bases for its "findings and conclusions [ ] on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet. App. 498, 506

(1995), aff'd per curiam, 78 F.3d 604 (Fed. Cir. 1996) (table).

Pursuant to 38 C.F.R. § 4.119, Diagnostic Code (DC) 7913 (2011), a 20% disability rating is assigned when the claimant's condition requires "insulin and restricted diet, or; oral hypoglycemic agent and restricted diet." A 40% disability rating is assigned where the claimant's condition requires "insulin, restricted diet, and regulation of activities." *Id.*

Here, the medical evidence does not show that the appellant is currently prescribed insulin. Rather, the medical evidence states that the appellant is currently prescribed and treated with glipizide, Metformin, acarbose, and Byetta. R. at 398. While the appellant argues that his use of Byetta is analogous, but admits not identical, to requiring insulin, Appellant's Br. at 14, the Court notes that the plain language of the regulation states "insulin," and does not include a supposed substitute.[1]

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[1] The appellant attaches to his brief an exhibit entitled "Byetta" which is an Internet article concerning Byetta. As the Secretary notes, the Court's review is limited to the record of proceedings before the Secretary and the Board. 38 U.S.C. § 7252(b); *see also Wilhoite v. West*, 11 Vet. App. 251, 252 (1998). In certain circumstances, this Court's rules provide that "[i]f determination of the issues requires consideration of superseded statutes, rules, or regulations, or unpublished authorities, relevant parts shall be reproduced in the brief or an appendix." U.S. Vet. App. R. 28(i). Furthermore, the Court may review documents not contained in the record of proceedings if they were "within the Secretary's control and could reasonably be expected to be a part of the record 'before the Secretary and the Board.'" *Bell v. Derwinski*, 2 Vet. App. 611, 613 (1992) (discussing the doctrine of constructive possession). As this information was not before the Board and (continued…)

As for the evidence that the appellant cites as evidence of his taking insulin, the Court agrees with the Secretary that the appellant relies upon a misstatement within the March 2009 rating decision and a December 2009 Statement of the Case (SOC). R. at 191-92, 230. The appellant quotes:

> Upon examination, you were noted to have a normal gait with no requirement for an assistive device. You had normal strength and sensation of all four extremities. Ankle edema with deep tendon reflexes and decreased hair of the lower extremities was noted. Previous lab tests were reported to include glucose of 152, BUN of 13, creatinine of 0.8, and elevated hemoglobin Al C. The examiner confirmed a diagnosis of diabetes mellitus requiring dietary restriction, oral medication, and insulin for control.

Appellant's Br. at 8, quoting R. at 191-92, 230. The Court notes that this paragraph appears verbatim in both the March 2009 rating decision and December 2009 SOC. As there is no evidence of an examiner stating that the appellant requires insulin, it appears that the misstatement in the March 2009 rating decision was copied in the December 2009 SOC. Upon review of the record, it appears that the RO was referencing the December 2008 diabetes

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does not fall under the category of "statute[], rule[], or regulation[], or unpublished authorit[y]," the Court will strike this exhibit from the record. The Court also notes that it can only take judicial notice of facts not subject to reasonable dispute.

mellitus examination; however, that examination did not find that the appellant was taking insulin. R. at 399. Instead, the examiner clearly stated that the appellant had "[d]iabetes mellitus type 2, currently treated with glipizide 10 mg one a day, metformin 1000 mg twice a day, acarbose 50 mg one-half tablet 3 times a day, and Byetta injections 10 units twice a day." R. at 399. The Court also notes that in a later SOC, this misstatement appears to be corrected and the RO stated that "Byetta is not a substitute for insulin" and that "there is no clinical evidence which established that you have been prescribed insulin for control of your diabetes mellitus." R. at 79. The Court concludes that the appellant errs in relying on the misstatements within the March 2009 rating decision and December 2009 SOC that are unsupported by actual evidence in the record.

The appellant argues that the Board improperly discounted his statement that he was taking insulin. Appellant's Br. at 9-10. "[T]he Board, as fact finder, is obligated to, and fully justified in, determining whether lay evidence is credible in and of itself, i.e., because of possible bias, conflicting statements, etc." *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006). The Board found that the appellant was competent to state that he was taking medications, but that due to the "many medical records to the contrary," his statement was outweighed by the evidence from his private physicians and the VA medical treatment records. The Board evaluated the December 2008 medical examination, VA outpatient records, private treatment records, and even medical evidence from the appellant's own physician. R. at 6-10; *see also* R. at 90-171, 217-222, 254-259, 356-388,

398-401, 458-483, 501-577, 628-663, 684-698, 721-779, 1385-1446. This evidence is void of evidence that the appellant was prescribed insulin.

B. 38 C.F.R. §§ 4.7 and 4.20

The appellant argues that his diabetes is more closely related to the criteria for a 40% rating, essentially arguing that 38 C.F.R. § 4.7 is applicable in this claim. He also argues that his diabetes should be rated as analogous "to the disease severity assigned a 40% disabling rating" based on 38 C.F.R. § 4.20. Appellant's Br. at 13-15.

As for the appellant's argument regarding 38 C.F.R. § 4.7, the Court has previously rejected this argument when it concluded that an appellant could not be rated 40% disabling, when he only satisfied two of the criteria of the 40% rating. *See Camacho v. Nicholson*, 21 Vet. App. 360, 366 (2007). As to the analogous rating argument, 38 C.F.R. § 4.20 is inapplicable, as this regulation is utilized to rate an unlisted condition. Here, diabetes is clearly a listed condition under the rating schedule. The Court concludes that the Board did not err in its application of the rating criteria for diabetes.

II. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's August 27, 2010, decision is AFFIRMED.

DATED: June 15, 2012

APPENDIX C

Board of Veterans' Appeals
Department of Veterans Affairs
Washington DC 20420

In the Appeal of Birdeye L. Middleton

DOCKET NO. 05-15 604) DATE: August 27, 2010
)
)

On appeal from the Department of Veterans Affairs
Regional Office in Columbia, South Carolina

THE ISSUES

1. Entitlement to service connection for a heart condition, to include mitral valve prolapse or a cardiac disorder manifested by chest pain.

2. Entitlement to a rating in excess of 20 percent for the Veteran's service-connected type II diabetes mellitus (diabetes).

REPRESENTATION

Appellant represented by: The American Legion

ATTORNEY FOR THE BOARD

Evan M. Deichert, Associate Counsel

INTRODUCTION

The Veteran had active service from January 1964 to February 1990.

This matter came before the Board of Veterans' Appeals (Board) on appeal from decisions of November 1990 and March 2009 by the Department of Veterans Affairs (VA) Columbia, South Carolina

Regional Office (RO).

Before proceeding to the merits of each claim, a review of the tortuous history of the Veteran's claim for service connection for a heart condition is instructive. In a September 1990 letter, the Veteran stated that an earlier rating decision had not considered his claim for residuals of two in-service heart attacks. This letter thus serves as the first manifestation of the claim before the Board today. The RO denied the Veteran's claim in November 1990, finding no evidence that the Veteran suffered two heart attacks in service. The Veteran filed a timely Notice of Disagreement in May 1991. The RO issued a Statement of the Case in August 1991. The Veteran then underwent a VA examination, and the RO issued a Supplemental Statement of the Case in August 1992. The case was never delivered to the Board, and no further action was taken at that time.

In January 2000, the Veteran filed a claim seeking service connection for mitral valve prolapse. This claim was denied in a June 2000 rating decision. Following the passage of the Veterans Claims Assistance Act, the RO reconsidered the Veteran's claim in an August 2001 rating decision. The Veteran took no action with regard to these claims.

In March 2003, the Veteran's claims were finally brought before the Board. The Board found no

evidence that the Veteran had ever suffered a myocardial infarction, so it denied the Veteran's claim for service connection for residuals of a heart attack. In that same decision, however, the Board determined that the Veteran's later claim for service connection for mitral valve prolapse related to his earlier claim for service connection for residuals of a heart attack. The Board thus recharacterized the issue from the Veteran's original filing to reflect his later claim for service connection, and the issue became "entitlement to service connection for mitral valve prolapse or a heart condition manifested by chest pain." As no Statement of the Case had been issued for this particular issue, the Board remanded the Veteran's claim so that such action could be taken. *See Manlincon v. West*, 12 Vet. App. 238, 240-41 (1999).

The RO issued a Statement of the Case in March 2005, and the Veteran promptly filed a Substantive Appeal. In that appeal, the Veteran stated that he wished to testify in a hearing at the local office. In a June 2005 letter, the Veteran stated that he no longer desired to testify in such a hearing, and the case then returned to the Board. The Board issued a decision in October 2007 denying service connection for mitral valve prolapse or a cardiac disorder manifested by chest pain.

The Veteran appealed this decision to the Court of Appeals for Veterans Claims (Court). In a March 2010 decision, the Court vacated the Board's October 2007 decision and remanded the case to the Board. The Court found that while previous VA examinations had determined that the Veteran was not suffering from mitral valve prolapse, these

examinations "did not address whether any cardiac disorder, other than myocardial infarction or hypertension, was present."

The Board recognizes that where a case has been remanded to the Board, the order of the Court constitutes the law of the case, and the Board is bound to follow the Court's mandate. *See Winslow v. Brown*, 8 Vet. App. 469, 472 (1996). In order to comply with the Court's instruction, and in an effort to end the confusion and delay in deciding this case, the Board has recharacterized the issue from "entitlement to service connection for mitral valve prolapse or a cardiac disorder manifested by chest pain" to "entitlement to service connection for a heart condition.

The issue of entitlement to service connection for a heart condition is addressed in the REMAND portion of the decision below and is REMANDED to the RO via the Appeals Management Center (AMC), in Washington, DC.

FINDING OF FACT

Though the Veteran is on a restricted diet, has regulation of activities, and uses an oral hypoglycemic agent, he does not use insulin to regulate his diabetes.

CONCLUSION OF LAW

The criteria for a rating in excess of 20 percent for diabetes have not been met. 38 U.S.C.A. §§ 1155, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.159, 4.1, 4.2,

4.3, 4.7, 4.41, 4.119, Diagnostic Code (DC) 7913 (2009).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Disability ratings are intended to compensate impairment in earning capacity due to a service-connected disorder. 38 U.S.C.A. § 1155. Separate diagnostic codes identify the various disabilities. *Id.* It is necessary to evaluate the disability from the point of view of the veteran working or seeking work and to resolve any reasonable doubt regarding the extent of the disability in the veteran's favor. 38 C.F.R. §§ 4.2, 4.3. If there is a question as to which evaluation to apply to the veteran's disability, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

While the Veteran's entire history is reviewed when assigning a disability evaluation, where service connection has already been established and an increase in the disability rating is at issue, it is the present level of disability that is of primary concern. *Francisco v. Brown*, 7 Vet. App. 55 (1994). That being said, staged ratings are appropriate for an increased rating claim whenever the factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings. *See Hart v. Mansfield*, 21 Vet. App. 505 (2007).

In considering the severity of a disability, it is essential to trace the medical history of the veteran.

38 C.F.R. §§ 4.1, 4.2, 4.41. Consideration of the whole-recorded history is necessary so that a rating may accurately reflect the elements of disability present. 38 C.F.R. § 4.2; *Peyton v. Derwinski*, 1 Vet. App. 282 (1991).

A review of the history of the Veteran's claim is instructive. The Veteran first sought service connection for his diabetes in October 2001. The RO granted service connection in a July 2002 rating decision, assigning a 20 percent rating. The RO changed the effective date of the Veteran's award to May 8, 2001 in an April 2004 rating decision. *See Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368 (Fed. Cir. 2002).

The Veteran filed a claim seeking an increased rating for his diabetes in October 2008. After he underwent a VA diabetes examination in December 2008, the RO issued a rating decision in March 2009 that left the Veteran's rating unchanged. The Veteran filed a timely Notice of Disagreement, and the RO issued a Statement of the Case in December 2009. The Veteran filed a timely Substantive Appeal, and the RO then issued a Supplemental Statement of the Case in January 2010.

Type II diabetes mellitus is evaluated under 38 C.F.R § 4.119a, Diagnostic Code 7913. Under that code, the 20 percent rating assigned contemplates diabetes mellitus requiring insulin and a restricted diet, or requiring the use of an oral hypoglycemic agent and restricted diet. A higher 40 percent rating is warranted for diabetes requiring insulin, restricted diet, and regulation of activities. *Id.*

A 60 percent rating is warranted for requiring insulin, restricted diet, and regulation of activities with episodes of ketoacidosis or hypoglycemic reactions requiring one or two hospitalizations per year or twice a month visits to a diabetic care provider, plus complications that would not be compensable if separately evaluated. *Id.*

A 100 percent rating is warranted for requiring more than one daily injection of insulin, restricted diet, and regulation of activities (avoidance of strenuous occupational and recreational activities) with episodes of ketoacidosis or hypoglycemic reactions requiring at least three hospitalizations per year or weekly visits to a diabetic care provider, plus either progressive loss of weight and strength or complications that would be compensable if separately evaluated. *Id.*

Here, the Veteran contends that since his diet is restricted, his activities are regulated, and he uses an oral hypoglycemic agent, he meets the criteria for a 40 percent rating. For the reasons that follow, however, the Board concludes that the criteria for a 40 percent rating have not been met.

The Veteran underwent a VA diabetes examination in December 2009. The Veteran stated that he was on a diabetic diet and walked regularly. The Veteran denied any hypoglycemic or ketoacidotic episodes. The Veteran denied suffering from any numbness or tingling in his hands. While he stated that he does have occasional tingling in his feet, he did not have any numbness.

Upon examination, the examiner noted that the Veteran walked with a normal gait with no assistive

devices. Sensation was normal in both the upper and lower extremities bilaterally. The Veteran was noted to have full strength in the upper and lower extremities bilaterally. Though the Veteran had calluses on the heel of his left foot, his right foot was unremarkable. The examiner noted no ulcerations or skin breakdowns on the Veteran's feet. The Veteran's toenails were intact. The Veteran did note edema in the Veteran's ankles bilaterally, but he did not attribute this edema to the Veteran's diabetes. The examiner concluded that the Veteran suffers from type II diabetes mellitus, treated with three oral hypoglycemic agents and daily Byetta injections.

While records of the Veteran's outpatient VA treatment have been associated with the claims folder, this evidence does not affect the Board's decision greatly. The majority of the evidence details the Veteran's mental health treatment. To the extent that these records do mention the Veteran's treatment for diabetes, they are notable only for the fact that they do not mention that he requires insulin.

Also associated with the claims file are the records and opinions of the Veteran's doctor, Thaddeus Bell, MD. A review of the treatment records from Dr. Bell does not reveal that he has required the Veteran to use insulin to control his diabetes. Indeed, treatment records from January to June of 2008 specifically refer to the Veteran as a non-insulin dependent diabetic.

Dr. Bell has also written three letters to VA, but none of these state that control of the Board's diabetes requires insulin. In October 2008, Dr. Bell wrote that the Veteran's diabetes required oral

medication, a restricted diet, and regulation of activities. In an April 2009 letter, Dr. Bell stated that the Veteran had been treated with oral hypoglycemic agents. When the Veteran's diabetes was no longer in control, Dr. Bell stated that he added Byetta to the Veteran's treatment regimen. The Board notes that while Byetta is a medication used to control diabetes, it is not insulin. In a December 2009 letter, Dr. Bell stated that, per his recommendations, the Veteran's daily activities have been regulated.

The fact that the Veteran's diabetes does not require the use of insulin ultimately precludes his being awarded a rating in excess of 20 percent. Again, a 40 percent rating is assigned for diabetes requiring insulin, restricted diet, and regulation of activities. 38 C.F.R. § 4.119, DC 7913. Here, though the Veteran follows a restricted diet and has regulated activities, the medical evidence consistently reflects that he does not require insulin and has not used it to treat his diabetes. Use of insulin is a necessary element for the 40 percent rating; the fact that the Veteran has not been required to use insulin thus precludes his being assigned this increased rating. As each of the ratings in excess of 40 percent similarly requires evidence of insulin use, ratings above 40 percent are also not warranted. Also, as the Veteran's disability has remained consistent over the appeals period, staged ratings are not appropriate.

In his December 2009 Substantive Appeal, the Veteran stated that he uses insulin to treat his diabetes. While the Veteran is certainly competent to state what medications he uses to treat his diabetes,

his statement that he is using insulin is outweighed by the many medical records to the contrary.

The Board has also considered whether the Veteran is eligible for separate ratings for the resultant side effects of his diabetes, but determines that no such ratings are warranted. The Board notes that the Veteran was granted both service connection and special monthly compensation for erectile dysfunction secondary to his diabetes in a November 2009 rating decision. The Veteran has also been service connected for residuals of a bunionectomy and heel spurs in his left foot, and heels spurs with callus in his right. The December 2008 VA examination noted that the Veteran suffered from edema in his ankles. The examiner did not attribute this edema to the Veteran's diabetes, nor did he diagnose the Veteran as suffering from a specific disability with regard to this edema. The examiner did not report the Veteran to be suffering from any other disabilities secondary to his diabetes. A July 2009 VA ophthalmology note reflects that the Veteran is not suffering from retinopathy. Absent any medical evidence that the Veteran is currently suffering from separate conditions secondary to his service-connected diabetes, the Board concludes that no such separate ratings are warranted.

The Veteran's disability is also not so severe as to warrant an extraschedular rating. As outlined by the Court, the Board uses a three-step inquiry to determine whether an extraschedular rating is warranted; "initially, there must be a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for

that disability." *Thun v. Peake*, 22 Vet. App. 111, 115 (2008).

In this case, the applicable rating criteria are adequate to evaluate the Veteran's disability. The Diagnostic Code includes the specific manifestations of the Veteran's diabetes, namely his regulation of activities, restricted diet, and use of oral hypoglycemic agents. The Veteran has been service connected for those conditions that are secondary to his diabetes. The Veteran's pattern of disability is thus contemplated in the applicable rating criteria. The first *Thun* criterion is thus satisfied, and the Board concludes that an extraschedular evaluation is thus not appropriate in this case.

Again, as the Veteran's treatment of his diabetes does not require the use of insulin, the Board concludes that the criteria for a rating in excess of 20 percent for diabetes have not been met. 38 U.S.C.A. §§ 1155, 5107; 38 C.F.R. §§ 3.102, 3.159, 4.1, 4.2, 4.3, 4.7, 4.41, 4.119, DC 7913.

Finally, the Veterans Claims Assistance Act of 2000 (VCAA) describes VA's duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2009).

Here, the VCAA duty to notify was satisfied by way of a letter sent to the Veteran in December 2008, prior to the initial RO decision in this matter. The letter informed the Veteran of what evidence was required to substantiate the claim and of his and VA's respective duties for obtaining evidence. This letter further provided the Veteran with the specifics

of the applicable Diagnostic Code and explained what evidence would be required to merit an increased rating. *See Vazquez-Flores v. Peake*, 22 Vet. App. 37, 43-44 (2008), vacated sub. nom. *Vazquez-Flores v. Shinseki*, Nos. 2008-7150, 2008-7115, 2009 WL 2835434 (Fed. Cir. Sept. 4, 2009). Under these circumstances, the Board finds that the notification requirements of the VCAA have been satisfied as to timing and content.

Next, VA has a duty to assist the Veteran in the development of his claim. This duty includes assisting him in the procurement of both service treatment records and other pertinent medical records and providing an examination when necessary. 38 U.S.C.A. § 5103A; 38 C.F.R. § 3.159. In this case, the RO has obtained and associated with the claims file the Veteran's service treatment records, his post-service VA treatment records, and records of his private treatment. The Veteran underwent a VA compensation and pension examination in December 2008. The Board notes that the evidence already of record is adequate to allow resolution of the appeal. Hence, no further notice or assistance to the Veteran is required to fulfill VA's duty to assist in the development of the claim. *Smith v. Gober*, 14 Vet. App. 227 (2000), aff'd, 281 F.3d 1384 (Fed. Cir. 2002); *Dela Cruz v. Principi*, 15 Vet. App. 143 (2001); *see also Quartuccio v. Principi*, 16 Vet. App. 183 (2002).

The Board finds that all necessary development has been accomplished, and appellate review does not therefore result in prejudice to the Veteran. *See Bernard v. Brown*, 4 Vet. App. 384 (1993).

ORDER

A rating in excess of 20 percent for the Veteran's service-connected diabetes is denied.

REMAND

Again, in a March 2010 decision, the Court of Appeals for Veterans Claims vacated an earlier October 2007 Board decision and remanded the Veteran's claims for proceedings consistent with its decision.

In its March 2010 decision, the Court concluded that a 2004 VA examination did not comply with the Board's remand instructions, as the examiner "did not address whether any cardiac disorder, other than myocardial infarction or hypertension, was present." The Veteran's claim thus must be remanded in order to secure an examination that complies with the Court's instructions.

Accordingly, the case is REMANDED for the following action:

1. The RO/AMC should schedule the Veteran for an examination before a VA cardiologist or a physician with the appropriate expertise in diagnosing heart conditions. All indicated studies, tests and evaluations deemed necessary should be performed.

The examiner is asked to provide an opinion as to whether the Veteran is currently suffering from any heart condition other than hypertension. After reviewing the Veteran's claims file, the examiner is also asked to state

whether the Veteran has suffered from a heart condition other than hypertension at any time since September 1990. If the examiner finds that the Veteran is currently or has previously suffered from a heart condition, he/she is first asked to identify the specific heart disorder(s) and then asked to provide an opinion as to its etiology of such disorder. The examiner should specifically state whether it is at least as likely as not that the Veteran's heart condition was incurred in his active service, or is otherwise related to service. In this regard, the examiner must take into account the Veteran's reported symptoms he claims to have had in service.

In formulating the opinion, the term "at least as likely as not" does not mean "within the realm of possibility." Rather, it means that the weight of the medical evidence both for and against causation is so evenly divided that it is as medically sound to find in favor of causation as it is to find against causation.

A clear rationale for all opinions would be helpful and a discussion of the facts and medical principles involved would be of considerable assistance to the Board. However, if the requested opinion cannot be provided without resort to speculation, the examiner should so state and explain why an opinion cannot be provided without resort to speculation.

Since it is important "that each disability be viewed in relation to its history," 38 C.F.R. § 4.1, copies of all pertinent records in the Veteran's claims file, or, in the alternative, the

claims file, must be made available to the examiner for review in connection with the examination. The examiner should specifically state that he reviewed this information.

2. The RO/AMC shall then readjudicate the Veteran's claim. If the benefit sought on appeal remains denied, the Veteran and his representative should be provided with a Supplemental Statement of the Case. An appropriate period of time should be allowed for response.

The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2009).

K. OSBORNE

Veterans Law Judge, Board of Veterans' Appeals

APPENDIX D

United States Court of Appeals
Federal Circuit

BIRDEYE L. MIDDLETON,
Claimant-Appellant,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,
Respondent-Appellee.

No. 2013-7014.

Before RADER, Chief Judge, NEWMAN, PLAGER[1], LOURIE, DYK, PROST, MOORE, REYNA, WALLACH, TARANTO, and CHEN, Circuit Judges.[2]

NEWMAN, Circuit Judge, with whom WALLACH, Circuit Judge, joins, dissenting from the denial of the petition for rehearing en banc.

PLAGER, Circuit Judge, dissenting from the denial of the petition for panel rehearing.

PER CURIAM.

ORDER

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[1] Circuit Judge Plager participated only in the decision on the petition for panel rehearing.

[2] Circuit Judges O'Malley and Hughes did not participate.

A combined petition for panel rehearing and rehearing en banc was filed by claimant-appellant, and a response thereto was invited by the court and filed by respondent-appellee. The petition for rehearing was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response were referred to the circuit judges who are authorized to request a poll of whether to rehear the appeal en banc. A poll was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition of claimant-appellant for panel rehearing is denied.

(2) The petition of claimant-appellant for rehearing en banc is denied.

(3) The mandate of the court will issue on February 10, 2014.

NEWMAN, Circuit Judge, dissenting from denial of the petition for rehearing en banc.

By decision issued August 15, 2013, a split panel of this court announced a new rule for the assessment of disability ratings under the Department of Veterans Affairs Schedule for Rating Disabilities. According to this new rule, "when a veteran does not satisfy all of the required criteria of the higher rating but does satisfy all of the criteria of the lower rating," the veteran is only entitled to receive the lower rating. The court thus discards the flexibility that is expressly provided in the regulations.

This new judge-made rule was not presented by the government on this appeal. It contravenes the policy of the Schedule's General Policy in Rating, and is inconsistent with VA regulation 38 C.F.R. §4.7, which requires determination of which rating "the disability picture more nearly approximates":

> §4.7 Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned.

Instead, the court discards the flexibility of "more nearly approximates" in favor of a bright-line rule, the panel majority holding that:

> [T]here is no question as to which evaluation shall be applied when a veteran does not satisfy all of the required criteria

> of the higher rating but does satisfy all of the criteria of the lower rating.

Middleton v. Shinseki, 727 F.3d 1172, 1178 (Fed. Cir. 2013) (emphasis added). As here illustrated, the absence of even one of the listed criteria leaves "no question" that the lower rating must be applied. This judicial revision negates not only the letter but also the policy of the regulations.

Section 4.7 directs the rater to the veteran's "disability picture" for application of the Schedule for Rating Disabilities. The Schedule lists relevant criteria and assigns lower ratings to lesser impairments, and higher ratings when more severe criteria are present. The criteria are medically-derived guidelines, not rules of law, for §4.7 recognizes that precise correlations are not always present. The court's new requirement of the lower rating if all of the criteria listed for the higher rating are not met eliminates the discretion, indeed the obligation, of the rater to consider the veteran's "disability picture".

The panel majority's interpretation contradicts the foundational policies of veterans law. For example, §4.1 of the General Policy in Rating states that the "rating schedule is primarily a guide in the evaluation of disability," and §4.21 recognizes that "atypical instances" will not exhibit all of the listed criteria:

> §4.21 In view of the number of atypical instances it is not expected, especially with more fully described grades of disabilities, that all cases will show all the findings specified. Findings sufficiently

> characteristic to identify the disease and the disability therefrom, and above all, coordination of rating with impairment of function will, however, be expected in all instances.

Section 4.3 of the General Policy requires that reasonable doubt "be resolved in favor of the claimant":

> §4.3 It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant.

The regulations require applying disability ratings flexibly and in favor of the veteran. The court's new interpretation imposes a rigorous rule that does not accommodate individual, case-specific variation. The General Policy's principles require greater flexibility, as recently observed in Vazquez-Claudio v. Shinseki. 713 F.3d 112, 115-16 (Fed. Cir. 2013) ("[W]e must read the disputed language in the context of the entire regulation as well as other related regulatory sections in order to determine the language's plain meaning. . . . Entitlement to a 70 percent disability rating requires sufficient symptoms of the kind listed in the 70 percent requirements, or others of similar severity, frequency or duration . . . ."). The court in Vazquez-Claudio focused on the overall "occupational and social impairment with deficiencies in most

areas such as those enumerated in the regulation," *id.* at 118, rather than the rule now adopted where the absence of even one of the listed criteria will defeat the higher rating.

This new ruling thus conflicts with precedent as well as with statute, policy, and regulation. From the court's denial of en banc review, I respectfully dissent.

PLAGER, Circuit Judge, dissenting from denial of the petition for panel rehearing.

For the record, I dissent from the failure of the panel to self-correct itself regarding the clearly erroneous position taken in the majority opinion in this case. In the interest of brevity, I adopt as the explanation for my dissent from denial of the petition for panel rehearing, in addition to my original dissent, *Middleton v. Shinseki*, 727 F.3d 1172 (Plager, J., dissenting), the opinion of Judge Newman in her accompanying dissent from the denial of the petition for rehearing en banc.[1]

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[1] The Chief Judge advises that the rule in this circuit, recently pronounced by a majority of the judges of the court in regular active service, is that judges in senior status, of which I am one, are prohibited from joining another judge's dissent from a denial of en banc, or authoring their own dissent expressing on record a criticism of the judges in regular active service for the failure to take a case en banc. This apparently is the rule even in this case, though as a member of the original panel I am expressly authorized by law to have sat on the en banc panel if the court had agreed to have one, *see* 28 U.S.C. § 46(c), so that the failure to take the case en banc has denied me an opportunity to try to correct what I consider to be a miscarriage of justice. However, my compliance with this rule, prohibiting circuit judges, because they are in senior status, from expressing an opinion on this aspect of the decisional work of the court, should not be taken as agreement with this rule, its purpose, effect, or for that matter its constitutionality.