No. 13-1342

IN THE

Supreme Court of the United States

BIRDEYE L. MIDDLETON,

Petitioner,

v.

SLOAN D. GIBSON, ACTING SECRETARY OF VETERANS AFFAIRS

Respondent.

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

BRIEF OF THE AMERICAN LEGION AND VIETNAM VETERANS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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June 4, 2014

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The American Legion and Vietnam Veterans of America, as *amici curiae*, submit this brief in support of the Petition for a Writ of Certiorari filed by Petitioner Birdeye L. Middleton and request that the petition be granted.[1]

INTERESTS OF *AMICI CURIAE*

The American Legion was chartered by Congress in 1919 as a patriotic, mutual-help, war-time veterans' organization. It now is a community-service organization with approximately 2.5 million members. The American Legion serves military veterans in a myriad of ways. Among the many services it provides are assistance and representation of veterans in matters involving the Department of Veterans Affairs (VA), including help with appeals for veterans' benefits, reporting on the impact on veterans of VA health care policies and assisting severely injured service members with help in transitioning from the military. The American Legion represented Petitioner before the Board of Veterans Appeals.

Vietnam Veterans of America (VVA) is a Congressionally-chartered national veterans' service organization that is expressly dedicated to protecting the rights of Vietnam-era veterans. See 36 U.S.C. §§ 230501-230513. VVA assists veterans and their families, both members and non-members, in the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel for Petitioner Birdeye Middleton and Respondent Sloan Gibson received timely notice of *amici curiae's* intent to file this brief and have consented to its filing in letters being filed with the Clerk's office.

prosecution of claims for benefits by providing them with pro bono legal representation before the agency, the Board of Veterans Appeals and on appeal to the U.S. Court of Appeals for Veterans Claims. In addition, VVA's advocacy concerning issues of importance to individual veterans, as well as veterans as a group, extends to the legislative arena and broad-impact litigation.

BACKGROUND

Amici curiae adopt the factual background set forth by Petitioner. See Pet. 7-13. Below, we set forth a discussion of the statutory and regulatory background to provide a proper understanding of the decision below and the pressing need for this Court's review.

1. Federal "law entitles veterans who have served on active duty in the United States military to receive benefits for disabilities caused or aggravated by their military service." *Shinseki* v. *Sanders*, 556 U.S. 396, 400 (2009). The Department of Veterans Affairs (VA) administers the federal program that provides these benefits to veterans with service-connected disabilities. See generally *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1200 (2011). As this Court has explained, the VA's adjudicatory "process is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). For example, "[a] veteran faces no time limit for filing a claim, and once a claim is filed, the VA's process for adjudicating [the claim] . . . is *ex parte* and nonadversarial . . . ." *Henderson*, 131 S. Ct. at 1200 (citing 38 C.F.R. §§ 3.103(a), 20.700(c) (2010)). Further, the VA has a statutory duty to assist veterans in developing the evidence necessary to substantiate their claims. 38 U.S.C. §§ 5103(a), 5103a. Indeed,

when evaluating claims, the VA must give veterans the "benefit of the doubt" whenever positive and negative evidence on a material issue is roughly equal. *Id.* § 5107(b).

A principal component of the statutory scheme is the "schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries." 38 U.S.C. § 1155. By statute, in constructing that schedule, the Secretary's "ratings shall be based, as far as practicable, upon the *average* impairments of earning capacity resulting from such injuries in civil occupations." *Id.* (emphasis added). Further, the "schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely," in 10 percent increments from 10 percent to 100 percent. *Id.* The Secretary is required to "readjust this schedule of ratings" "from time to time," but no such "readjustment in the rating schedule [shall] cause a veteran's disability rating in effect on the effective date of the readjustment to be reduced unless an improvement in the veteran's disability is shown to have occurred." *Id.*

2. Pursuant to this statutory authority, the Secretary has promulgated regulations setting forth a schedule for rating disabilities. See generally 38 C.F.R. §§ 4.1-150. The regulations are divided into two subparts. Subpart A sets forth the "General Policy in Rating" the disabilities of veterans and applies to all of the ratings schedules identified in Subpart B. For example, within Subpart A, Section 4.3 sets forth 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." 38 C.F.R. § 4.3 (emphasis added). When "a reasonable doubt arises

regarding the degree of disability such doubt will be resolved in favor of the claimant." *Id.* In turn, Section 4.6 requires the evidence be evaluated "in the light of the established policies of the [VA] to the end that decisions will be equitable and just as contemplated by the requirements of the law." *Id.* § 4.6.

At issue here is the proper legal meaning of 38 C.F.R. § 4.7. Section 4.7 provides:

> 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.

Section 4.7 reflects that, by statute, the Secretary's rating schedule is limited to fixed categories of disability ratings between a low of 10 percent and high of 100 percent disability (in 10 percent increments). See 38 U.S.C. § 1155. Recognizing that the disabilities facing individual veterans will not all fit precisely within those fixed categories, the Secretary established a procedure for determining what disability rating would apply when a claimant's disability falls between two defined categories. Cf. 38 C.F.R. § 4.21 ("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."). In that circumstance, Section 4.7 requires that the claimant's disability rating be rounded (either up or down) to the rating level that "more nearly approximates the criteria required for that rating." *Id.* § 4.7.

Subpart B of the Secretary's regulations sets forth the various disability ratings for different types of physical and mental injuries. The ratings cover a

wide-variety of physical and mental ailments, including, for example, injuries to (i) the musculoskeletal system, 38 C.F.R. §§ 4.40-73, (ii) eye sight, *id.* §§ 4.75-79, (iii) hearing, *id.* §§ 4.85-87a, (iv) infectious diseases, immune disorders and nutritional deficiencies, *id.* §§ 4.88a-89, (v) respiratory system, *id.* §§ 4.96-97, (vi) digestive system, *id.* §§ 4.110-14, (vii) neurological conditions and convulsive disorders, *id.* §§ 4.120-24a, and (viii) mental disorders, *id.* §§ 4.125-30. For each of these types of claims, the Secretary has adopted a schedule of ratings of disability. *E.g.*, 38 C.F.R. § 4.71a ("Schedule of ratings—musculoskeletal system"); *id.* § 4.73 (Schedule of ratings—muscle injuries"); *id.* § 4.79 ("Schedule of ratings—eye"); *id.* § 4.87 ("Schedule of ratings—ear"). For each of these separate schedules, the policy principles reflected in Subpart A, including Section 4.7, guide the interpretation and analysis of the appropriate rating for individual veterans suffering from service-connected disabilities.

As relevant here, Section 4.119 addresses the schedule of ratings for the "endocrine system." With respect to claims of "Diabetes mellitus," a claimant "[r]equiring insulin and restricted diet, or; oral hypoglycemic agent and restricted diet" meets a 20 percent disability rating. 38 C.F.R. § 4.119. The next level of disability is 40 percent for a claimant "[r]equiring insulin, restricted diet, and regulation of activities." *Id.*

3. The proper legal interpretation of the Secretary's regulations governing the rating of disabilities for veterans is of surpassing importance to countless veterans. According to the National Center for Veterans Analysis and Statistics, the number of veterans with service-connected disabilities has increased from just over 2 million in 1985 to about 3.84 million in

2014.[2] In 2012 alone, cash payments to veterans with service-connected disabilities approached $45 billion dollars. U.S. Dep't Veterans Affairs, *supra* note 2, at 6. In fiscal year 2012, over 260,000 veterans began receiving service-connected disability benefits totaling $2.512 billion. *Id.* at 5-6. Veterans with a 100 percent disability received an average annual amount of $35,902, whereas veterans with a disability rating of 10 percent received an average annual payment of $1,533. *Id.* at 7.

As a result, the proper legal interpretation of 38 C.F.R. § 4.7 could have a system-wide impact on the rights of hundreds of thousands of veterans suffering from a wide-variety of service-connected disabilities.

SUMMARY OF ARGUMENT

For the reasons set forth in the petition, review by this Court is necessary to ensure a proper legal interpretation of the Secretary's standards for determining the level of disability benefits for veterans with service-connected disabilities. Pet. 14-26. The issue squarely presented by the petition concerns the proper legal interpretation of 38 C.F.R. § 4.7. Section 4.7 is a vitally important regulation within the VA's disability rating schedule and the policies that apply to

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[2] Nat'l Ctr. Veterans Analysis & Statistics, *Trends in Veterans with a Service-Connected Disability: 1985 to 2012* 4 (2014); Nat'l Ctr. Veterans Analysis & Statistics, *Department of Veterans Affairs Statistics at a Glance* 3 (2014). In 2012, veterans received service-connected disability benefits based on their service in World War II (167,724), Korean Conflict (145,090), Vietnam Era (1,214,530), Gulf War Era (1,344,652) and Peacetime (664,806). U.S. Dep't Veterans Affairs, *Annual Benefits Report Fiscal Year 2012* 5 (2013), *available at* http://www.benefits.va.gov/reports/abr/2012_abr.pdf.

analyze the appropriate disability rating under each of the VA's disability schedules.

Section 4.7 is a cornerstone of the VA's policy. It requires that "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*." 38 C.F.R. § 4.7 (emphasis added). Thus, by its terms, Section 4.7 addresses the common situation where a veteran's symptomology and treatment regime fall between two specified disability rating categories. The question resolved by the Federal Circuit and presented here is whether the VA must consider Section 4.7 where a veteran's documented disability is more pronounced than that described in a lower category of a ratings schedule, yet may not fully meet the criteria described for the next higher rating.

The language of Section 4.7, the structure of the Secretary's over-arching regulatory scheme and the long-standing policy of resolving interpretative disputes in favor of veterans refute the decision of the Federal Circuit below. Specifically, the Federal Circuit misinterpreted Section 4.7 by ruling that it is wholly inapplicable where "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. As observed in Judge Plager's dissenting opinion, that legal conclusion is wrong because Section 4.7 is designed to apply when a claimant's "symptomology and his treatment regimen place him somewhere between the two descriptive guides for the two ratings; he does not fit squarely into either." Pet. App. 14a.

Section 4.7 requires a determination whether "the disability picture *more nearly approximates* the criteria required for that [higher evaluation] rating." 38

C.F.R. § 4.7 (emphasis added). That language—"more nearly approximates"—means that a claimant may be entitled to the higher evaluation rating based on "something approximating the criteria—not the criteria itself." Pet. App. 15a (Plager, J., dissenting). Further, as explained by Judge Newman and Judge Wallach, the Federal Circuit's "new interpretation" of Section 4.7 "contradicts the foundational policies of veterans law," Pet. App. 43a, and "imposes a rigorous rule that does not accommodate individual, case-specific variation," *id.* at 44a. In doing so, the decision conflicts with this Court's cases applying "'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 131 S. Ct. at 1206 (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991)).

The Federal Circuit thus has rendered Section 4.7 essentially meaningless by holding that unless a veteran's symptomology and treatment regime meet the *exact* criteria of a particular higher rating, the veteran will never be entitled to the higher rating, no matter how closely his "disability picture" "approximates" the criteria specified for that higher rating. Thus, instead of assuring that the VA's determinations are based on a consideration of all factors that bear on a veteran's disability picture, the Federal Circuit's decision, if left unreviewed by this Court, will deprive veterans of the flexibility that the regulations are designed to grant the VA to reach equitable and just determinations of their disability claims.

The impact of the Federal Circuit's ruling is substantial as it may affect the proper resolution of the claims of hundreds of thousands of veterans who, each year, seek benefits for service-connected disabilities. The decision below thus undermines a core el-

ement of the regulatory regime affecting the proper resolution of claims to benefits involving millions of veterans and billions of dollars in annual disability benefit payments.

The petition should be granted.

ARGUMENT

I. THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 4.7 IGNORES THE LANGUAGE, STRUCTURE AND POLICY UNDERLYING DISABILITY BENEFITS FOR VETERANS.

The petition should be granted because the Federal Circuit's interpretation of a bedrock regulation governing the proper resolution of claims brought by veterans for service-connected disabilities is inconsistent with the language, structure and policy of the VA statute and regulations.

1. The Federal Circuit held that Section 4.7 was inapplicable 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." Pet. App. 10a (emphasis added). Under that reading, Section 4.7 applies only when a claimant can show that he or she satisfies all of the requirements for a higher evaluation rating. But that ignores that veterans' conditions may fall between a higher and lower rating, thereby presenting the question whether Section 4.7 may be applicable based on a showing that a claimant's "disability picture *more nearly approximates the criteria required for that [higher]* rating." 38 C.F.R. § 4.7 (emphasis added). Under the Federal Circuit's analysis, a claimant can demonstrate that he or she "*more nearly approximates* the criteria re-

quired" for a higher rating only by showing that the claimant actually satisfies "*all* of the required criteria of the higher rating," Pet. App. 10a (emphasis added). That interpretation of Section 4.7 should be rejected

First, the language of Section 4.7 presupposes a comparison of the "disability picture" of the claimant against the criteria required for both the "higher" and "lower" evaluation. Section 4.7 requires application of the higher evaluation when "the disability picture more nearly approximates the criteria required for that rating." 38 C.F.R. § 4.7. Where the "disability picture" does not "more nearly approximate[] the criteria required for that rating," then "the lower rating will be assigned." *Id.* Contrary to the Federal Circuit's decision, application of Section 4.7 does not mandate a threshold determination that *all* of the required criteria for the higher evaluation must be satisfied. Such a reading cannot be squared with Section 4.7 language that the "higher evaluation will be assigned if the disability picture *more nearly approximates the criteria required* for that rating." *Id* (emphasis added). The Federal Circuit's interpretation would render the "more nearly approximates" language of Section 4.7 meaningless. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001); see also *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute'" (quoting *Inhabitants of Twp. Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883))).

The Federal Circuit's interpretation fails to give independent meaning to Section 4.7. If a veteran fully meets the descriptive criteria of a higher rating—as the Federal Circuit's decision requires—the veteran is entitled to that rating even though he or she also meets the criteria of a lower rating. In that case, there would be no justifiable basis for applying the

lower rating and thus "no question" that would require the application of Section 4.7 for resolution. Instead, by its terms, Section 4.7 applies when the veteran's condition, even though it may not fully meet the criteria of a higher rating category, "more nearly approximates" the criteria for that higher rating than the criteria for the lower rating. 38 C.F.R. § 4.7. The "more nearly approximates" language of Section 4.7 should not be re-written to apply only when a veteran establishes that he or she "fully meets" the requirements of the "higher evaluation." Cf. *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988) ("[C]ourts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading.").

Second, the Federal Circuit's decision further disregards the foundational concepts embodied in the VA Schedule for Rating Disabilities, Part 4 of 38 C.F.R. The VA Schedule for Rating Disabilities has two subparts. Subpart A, which includes Section 4.7, establishes the "General Policy in Rating"; Subpart B sets forth "Disability Ratings" schedules for specific injuries, conditions or diseases. The policies and principles of Subpart A apply to the interpretation and application of the disability-specific schedules in Subpart B.

Subpart A explicitly states that the rating schedule is "primarily a guide" in evaluating disability resulting from "all types of diseases and injuries" as a result of military service. 38 C.F.R. § 4.1. The VA recognizes in Subpart A that the rating schedule should be used flexibly as a tool to approximate a veteran's disabilities and—given the diversity of conditions and injuries sustained during military service—should not be read as rigidly as the Majority presumes. See

38 C.F.R. § 4.21 ("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."). Moreover, the rating schedule should be "interpreted broadly and in a manner that is veteran friendly." Pet. App. 13a (Plager, J., dissenting).

Finally, Section 4.7 must be read in light of the long-settled principle that "'provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 131 S. Ct. at 1206 (quoting *King*, 502 U.S. at 220-21 n.9); see also *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). As a result, to the extent that there is any ambiguity with regard to the proper interpretation of Section 4.7, that ambiguity should be resolved in favor of veterans of the armed services.

As explained by Judge Plager, in dissent, the language, structure and policy dictate that Section 4.7 should operate as follows. First, "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." Pet. App. 16a-17a (Plager, J., dissenting). Second, if the veteran's disability "more nearly approximates the criteria for the higher rating," then Section 4.7 "honors substance over form by awarding the veteran the higher rating." *Id.* That interpretation gives effect to all of the language in the regulations at issue, honors the General Policy upon which those regulations are based, and assures that veterans will be appropriately compensated as required under the federal law.

2. The Federal Circuit based its interpretation of Section 4.7 on the word "and" as it appears in the 40

percent rating of DC 7913 in 38 C.F.R. § 4.119. The court below stated that "we must give meaning to the 'and' in the higher evaluation." Pet. App. 11a. The fact that the conjunction "and" is in a specific rating does not control the interpretation of Section 4.7. Rather, the core issue addressed by Section 4.7 is how to determine the proper rating when the claimant's disability picture falls between "two evaluations." In that circumstance, Section 4.7 requires a flexible comparison of the claimant's "disability picture" measured against the "criteria required" for the "higher" and "lower rating." 38 C.F.R. § 4.7. Section 4.7 directs that if the "disability picture" "more nearly approximates the criteria required for [the higher] rating" then "the higher evaluation will be assigned." *Id.* "Otherwise, the lower rating will be assigned." *Id.* Contrary to the principle of interpretation on which the Federal Circuit purports to rely, the decision below gives no meaning to the "more nearly approximates" language. Pet. App. 15a-17a (Plager, J., dissenting).

As support for its decision, the Federal Circuit pointed to two Veterans Court cases: *Camacho* v. *Nicholson*, 21 Vet.App. 360 (2007) and *Tatum* v. *Shinseki*, 23 Vet.App. 152 (2009). Neither of these decisions supports the Federal Circuit's interpretation. Although *Camacho* considered the denial of a claim under DC 7913, the opinion does not analyze, interpret, or address Section 4.7. And *Tatum* affirmatively supports Petitioner's claim because *Tatum* explained that the rule adopted by the Federal Circuit "would eviscerate the meaning of §4.7, which . . . requires the higher disability rating to be awarded when 'the disability picture more nearly approximates the criteria required for that rating.'" 23 Vet.App. at 156.

II. REVIEW IS WARRANTED BECAUSE THE FEDERAL CIRCUIT'S DECISION UNDERMINES THE RIGHTS OF VETERANS SEEKING SERVICE-CONNECTED DISABILITY BENEFITS.

The Federal Circuit's decision sets an important precedent that will guide the resolution of claims for benefits brought by veterans in the context of a federal program that provides billions of dollars of benefits to millions of veterans each year.

According to the National Center for Veterans Analysis and Statistics, the veteran population is projected as 21.9 million. *Department of Veterans Affairs Statistics at a Glance*, *supra* note 2, at 4. As noted previously, in 2014, the Secretary will provide service-connected disability benefits to more than 3.8 million veterans. *Id.* at 3. Moreover, in 2012, almost 262,000 veterans began receiving service-connected disability benefits. U.S. Dep't Veterans Affairs, *supra* note 2, at 5. The level of payment to individual veterans depends, in large part, on the degree of disability. Section 4.7 plays a critical role in guiding the Secretary's determination of the appropriate disability level for these veterans. As such, the proper interpretation of Section 4.7 has a profound effect on the benefits received by many thousands of veterans and their beneficiaries.

The far-reaching effects of the erroneous, rigid interpretation already have been seen in recent cases before the Federal Circuit. As noted in the petition, the Federal Circuit has applied its interpretation of Section 4.7 to review veterans' claims for conditions described in non-successive diagnostic codes that lack conjunctive criteria. Pet. 24. The decision deprives veterans, whose conditions "more nearly approximate" higher ratings, the much-needed financial aid

that comes with a higher rating, and in fact prohibits veterans from even being considered for it.

The nation's veterans are entitled to the "equitable and just" evaluation, as contemplated by the VA Schedule for Rating Disabilities, of the disabilities and conditions that they endure as a result of service to our country. The Federal Circuit's interpretation of Section 4.7 warrants review by this Court because it misconstrues a vital policy provision that guides the determination of disability ratings for countless veterans and their families.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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June 4, 2014

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