No. 13-837



In the
# Supreme Court of the United States

ARNOLD J. PARKS,

*Petitioner,*

v.

ERIK K. SHINSEKI,
Secretary of Veterans Affairs,

*Respondent.*

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

## BRIEF FOR THE FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Edgar H. Haug
Treasurer
FEDERAL CIRCUIT BAR ASSOCIATION
1620 I Street, NW
Suite 900
Washington, DC 20006
Telephone: (202) 466-3923

Daniel P. Graham
*Counsel of Record*
WILEY REIN, LLP
1776 K Street, NW
Washington, DC 20006
Telephone: (202) 719-7433
dgraham@wileyrein.com

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## THE INTEREST OF *AMICUS CURIAE* [1]

The Federal Circuit Bar Association ("FCBA") is a national organization for the Bar of the United States Court of Appeals for the Federal Circuit. It unites the different groups across the Nation that practice before that court, seeking to strengthen and serve the court. Among other activities, the FCBA helps facilitate *pro bono* representation for veterans with potential or actual litigation within the Federal Circuit's jurisdiction, with a view to improving the litigation process with an eye toward fundamental fairness to all litigants.[2]

Imposition of an issue exhaustion requirement during non-adversarial proceedings before the Department of Veterans Affairs ("VA") would significantly undermine the FCBA's ability to facilitate meaningful *pro bono* representation for disabled veterans. As discussed below, most

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

[2] FCBA members who are government employees played no role in deciding whether to file this brief or in developing the content of this brief.

veterans proceed *pro se* before the VA and obtain representation by counsel for the first time, if at all, when they appeal their claim to the United States Court of Appeals for Veterans Claims (the "Veterans Court"). *See infra* § II. A rule that prevents counsel from identifying and presenting on judicial review sophisticated legal and technical arguments that veterans cannot, and should not, be expected to identify on their own frustrates the fair and efficient adjudication of those veterans' claims for benefits.

## SUMMARY OF THE ARGUMENT

This Court should grant the petition for certiorari because the issue exhaustion rule applied by the panel below conflicts with *Sims v. Apfel*, 530 U.S. 103 (2000), and undermines the non-adversarial, claimant-friendly process that Congress established for the determination of claims for veterans benefits. Although the details of Mr. Parks's disability are unique, the procedural history of his claim is similar to that of thousands of veterans who proceed *pro se* through the VA's informal, non-adversarial agency-level proceedings, and who retain counsel (if at all) only when they appeal to the Veterans Court. Not surprisingly, the assistance of counsel often enables veterans to identify legal and technical arguments that the veterans were not able to identify and articulate on their own.

Mr. Parks's struggle for disability compensation is a perfect example. In order to determine whether

Mr. Parks's illnesses are connected to his service, the VA provided Mr. Parks with a medical examination by an advanced registered nurse practitioner ("ARNP"). Pet. App. at 8a. Like the vast majority of veterans seeking disability benefits, Mr. Parks proceeded *pro se* before a VA Regional Office ("RO") and, subsequently, the Board of Veterans Appeals ("BVA"). *Id.* at 8a-9a; *see infra* § II. Mr. Parks did not challenge the qualifications of the ARNP before the RO or BVA. Pet. App. at 8a-9a.

On appeal to the Veterans Court, however, Mr. Parks was represented by counsel who reviewed the record and determined that the ARNP's examination report did not constitute the "[c]ompetent medical evidence" required by VA regulations. 38 C.F.R. § 3.159(a)(1); *see* Pet. App. at 9a. The Federal Circuit, however, ruled that Mr. Parks "waived" his right to make that legalistic and technical argument by not challenging the ARNP's qualifications before the BVA. Pet. App. at 11a, 13a.

*Sims* makes clear that imposing issue exhaustion on a claimant is inappropriate where the proceedings are non-adversarial. 530 U.S. at 112. As this Court, Congress, and the President have long recognized, the non-adversarial, claimant-friendly nature of the VA's system for deciding benefits claims is unlike any other adjudicative process. *See infra* § I. Many of the pro-claimant features of this process, such as the VA's duty to assist veterans in

the development of their claims and the VA's obligation to sympathetically read veterans' filings, owe their very existence to the typical veteran's inability to articulate specific legal arguments to advance his or her claim. *See infra* § III. An issue exhaustion rule that results in veterans "waiving" arguments that they cannot, and are not expected to, identify and articulate has no place in the statutory scheme established by Congress.

## ARGUMENT

### I. THE ISSUE EXHAUSTION RULE APPLIED BY THE FEDERAL CIRCUIT CONFLICTS WITH THIS COURT'S PRECEDENT DUE TO THE NON-ADVERSARIAL, CLAIMANT-FRIENDLY NATURE OF PROCEEDINGS BEFORE THE VA.

In *Sims v. Apfel*, this Court held that Social Security claimants who properly exhaust administrative remedies prior to judicial review do not waive any issues that the claimants failed to present to the agency. 530 U.S. at 105. *Sims* explained that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109. The Court further explained that, "[w]here, by contrast, an administrative proceeding is not adversarial, we

think the reasons for a court to require issue exhaustion are much weaker." *Id.*

The differences between adversarial judicial proceedings and agency proceedings are nowhere more pronounced than in veterans benefits claims. Congress has long provided "special solicitude for the veterans' cause." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). As a result, this Court has recognized that "the process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985).[3] Instead, "Congress desired that the proceedings be as informal and nonadversarial as possible," *id.* at 323-24, and the process is "designed to function throughout with a high degree of informality and solicitude for the claimant," *id.* at 311.

Most recently, in *Henderson v. Shinseki*, 131 S. Ct. 1197, 1205-06 (2011), this Court emphasized: "The contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic." *Henderson* specifically contrasted the "adversarial" nature of civil litigation

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[3] All emphasis in this brief is added unless otherwise indicated.

with the "nonadversarial" nature of claims for veterans benefits, in which the laws "place a thumb on the scale in the veteran's favor." *Id.* at 1199; *accord* S. Rep. No. 100-418, at 29 (1988).

Among the many non-adversarial elements of the veterans benefits claims adjudication process, the Secretary of Veterans Affairs must make all "reasonable efforts to assist" a veteran in developing a claim. 38 U.S.C. § 5103A(a)(1). Congress required the Secretary to err on the side of providing too many benefits: whenever "there is an approximate balance of positive and negative evidence," the Secretary "shall give the benefit of the doubt to the claimant." *Id.* § 5107(b). And Congress established a lopsided scheme for obtaining court review: A veteran can challenge an adverse decision by the BVA in the Veterans Court, but the Secretary cannot. *Id.* § 7252(a).

In tailoring this statutory scheme to make it as claimant-friendly as possible, both Congress and the President repeatedly have emphasized the non-adversarial nature of the veterans benefits system as a "means by which the Nation expresses its profound gratitude for the many sacrifices our veterans have made to protect and defend our freedom." Statement by President Clinton upon Signing H.R. 4864 (Nov. 9, 2000), *reprinted in* 2000 U.S.C.C.A.N. 2017; H.R. Rep. No. 106-781, at 5 (2000) ("[T]he Department of Veterans Affairs' system for deciding benefits claims

is unlike any other adjudicative process. It is specifically designed to be claimant friendly. It is non-adversarial; therefore, the VA must provide a substantial amount of assistance to a veteran seeking benefits." (internal quotation marks omitted)). In fact, Congress made a point of preserving the non-adversarial, pro-claimant character of the veterans benefits system when it added judicial review to the system in 1988:

> Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.
>
> I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule,

> hearsay evidence exclusion, or strict adherence to burden of proof.

H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795; *accord Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (discussing the 1988 legislation and noting that "Congress emphasized the historically non-adversarial system of awarding benefits to veterans and discussed its intent to maintain the system's unique character").

Federal Circuit precedent similarly recognizes the non-adversarial nature of proceedings before the BVA. *See, e.g., Gambill v. Shinseki*, 576 F.3d 1307 (Fed. Cir. 2009) ("'Viewed in its entirety, the veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus.'" (quoting *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (en banc) (Mayer, C.J., dissenting)); *Hodge*, 155 F.3d at 1362 ("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant."). The Federal Circuit has further emphasized that "[t]he VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim. . . ." *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009); *see also Percy v. Shinseki*, 23 Vet. App. 37, 47 (2009) ("It is inconsistent with that congressional intent for VA to treat its procedures as a minefield

that the veteran must successfully negotiate in order to obtain the benefits that Congress intended to bestow on behalf of a grateful nation.").

## II. CONSISTENT WITH THE NON-ADVERSARIAL NATURE OF AGENCY PROCEEDINGS, MOST VETERANS PROCEED PRO SE THROUGH THE ADJUDICATION OF THEIR CLAIMS BY THE BVA.

Consistent with the non-adversarial nature of the veterans benefits process, veterans are "often unrepresented during the claims proceedings." *Sanders*, 556 U.S. at 412; *Kelly v. Nicholson*, 463 F.3d 1349, 1353 (Fed. Cir. 2006) (observing that "veterans generally are not represented by counsel before the RO and the board"). In Fiscal Year 2012, veterans were represented by counsel in approximately 9.8% of the 44,300 appeals disposed of by the BVA that year. Board of Veterans' Appeals, *Annual Report of the Chairman* at 23 (2013) ("2013 BVA Annual Rep."), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf. From Fiscal Years 2002 to 2011, that percentage varied from 2% (2007) to 10% (2002). Board of Veterans' Appeals, *Annual Reports of the Chairman* (2002-2012), *available at* http://www.bva.va.gov/Chairman_Annual_Rpts.asp.

Like Mr. Parks, most veterans obtain counsel for the first time when they appeal to the Veterans

Court or during the pendency of that appeal. Between 2001 and 2009, 30-47% of veterans were represented by counsel at the time they filed their appeal to the Veterans Court, and 65-81% were represented by the time the case was decided. Court of Appeals for Veterans Claims, *Annual Reports* (2000-2009), *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf.

Not surprisingly, the assistance of counsel often permits the veteran to identify legal arguments that the veteran was unable to identify on his or her own. The Federal Circuit recognized this reality in *Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000), when it declined to impose an "an across-the-board presumption for or against invocation of the exhaustion doctrine." *Maggitt* cautioned against applying the exhaustion of remedies doctrine against a party such "that the party's arguments go unheard," *id.* at 1377, because, at that time, "[r]ealistic considerations . . . reduce[d] the ability of . . . veteran[s] to mount legal challenges in the regional office or at the Board," *id.* at 1378.[4]

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[4] The Federal Circuit in *Maggitt* was concerned specifically that, because attorneys were then statutorily prohibited from collecting a fee for services provided prior to a final Board decision, they were unlikely to represent veterans before VA. *See Maggitt*, 202 F.3d at 1378 (citing 38 U.S.C. § 5904(c)(1) (1994)). Although Congress has since authorized attorneys to

## III. THE ARGUMENT "WAIVED" BY MR. PARKS IS PRECISELY THE SORT OF LEGALISTIC, TECHNICAL ARGUMENT VETERANS ARE NOT EXPECTED TO ARTICULATE IN AGENCY-LEVEL PROCEEDINGS.

The Panel below departed from *Sims*, *Maggitt*, and from the non-adversarial, claimant-friendly scheme established by Congress when it ruled that Mr. Parks "waived" his right to challenge the ARNP's qualifications by not making that argument before the BVA. Pet. App. at 11a, 13a. The argument forfeited by Mr. Parks was sophisticated and legalistic—whether the ARNP's examination report constituted the required "[c]ompetent medical evidence." 38 C.F.R. § 3.159(a)(1). As the Federal Circuit's opinion makes clear, this argument not only involves legal presumptions and evidentiary burdens, it requires an understanding of the scope of the ARNP's medical training and whether that training sufficiently qualified the ARNP to report on Mr. Parks's complex medical condition. Pet. App. at 11a-13a.

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collect a reasonable fee for representation provided to veterans in proceedings before VA, *see* 38 U.S.C. § 5904(c), the fact remains that veterans are seldom represented by counsel in agency-level proceedings. *Sanders*, 556 U.S. at 412; 2013 BVA Annual Rep., *supra*, at 23.

In the FCBA's experience, most veterans proceeding *pro se* are not capable of identifying, let alone articulating and supporting, such legalistic and technical arguments. More importantly, these are precisely the sorts of arguments that Congress does not expect veterans to raise on their own. Indeed, the VA's statutory duties to assist veterans in the development of their claims and to sympathetically read claimant filings owe their very existence to the typical veteran's inability to articulate specific legal arguments to advance his or her claim:

> The duty to sympathetically read exists because a pro se claimant is not presumed to know the contents of title 38 or to be able to identify the specific legal provisions that would entitle him to compensation. Again, there would be no need for the duty to sympathetically read pleadings if pro se claimants had encyclopedic knowledge of veterans law.

*Ingram v. Nicholson*, 21 Vet. App. 232, 256 (2007); *accord Comer*, 552 F.3d at 1368-69 ("A liberal and sympathetic reading of appeal submissions is necessary because a pro se veteran may lack a complete understanding of the subtle differences in various forms of VA disability benefits and of the sometimes arcane terminology used to describe those benefits.").

As discussed above, it remains a reality that veterans are seldom represented by counsel in agency-level proceedings. *Sanders*, 556 U.S. at 412; 2013 BVA Annual Rep., *supra*, at 23. Not only did Congress design the veterans benefits system to operate without the need for attorneys, until recently the system actually discouraged the retention of attorneys whose fees might consume part of a veteran's benefits:

> The Government interest, which has been articulated in congressional debates since the fee limitation was first enacted in 1862 during the Civil War, has been this: that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer.

*Walters*, 473 U.S. at 321; *see* 38 C.F.R. § 3.103(e) (permitting veterans to be represented by paid counsel at hearings within the VA). Attorney representation before the VA, while permissible, should not be made a *de facto* requirement by judicial imposition of an issue-exhaustion requirement.

## CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,


Edgar H. Haug
Treasurer
FEDERAL CIRCUIT BAR ASSOCIATION
1620 I Street, NW
Suite 900
Washington, DC 20006
(202) 466-3923

Daniel P. Graham
*Counsel of Record*
WILEY REIN, LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7433
dgraham@wileyrein.com

*Counsel for Amicus Curiae*
*Federal Circuit Bar Association*


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