No. _____

In The

Supreme Court of the United States

LARRY G. TYRUES,

Petitioner,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In its first opinion in this case, the United States Court of Appeals for the Federal Circuit (hereafter "the Federal Circuit") held that a United States Board of Veterans' Appeals (hereafter "the Board") decision, denying only part of a single claim and remanding the remainder (a so-called "mixed decision"), is a *final decision* within the meaning of 38 U.S.C. § 7266(a) if the Board designates it as such. Appendix (hereafter "App.") 66, 97-98. And with a *final decision* designation, a mixed Board decision must be appealed to the United States Court of Appeals for Veterans Claims (hereafter "the Veterans Court") within the 120-day time frame of § 7266(a). The Federal Circuit rejected petitioner's contention that a mixed Board decision is non-final, thus permitting, but not requiring, an interlocutory appeal. App. 58-67.[1]

Shortly thereafter, this Court issued an intervening decision, *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), holding that the 120-day appeal period of § 7266(a) is non-jurisdictional. In so deciding, *Henderson* stated broadly and emphatically that the Veterans Administration's (hereafter "VA") pro-claimant

[1] Petitioner and Respondent agree that veterans have a right to appeal mixed Board decisions. The only question is whether this right to an immediate appeal is discretionary or mandatory. App. 8 ("Neither party disputes that a veteran can immediately appeal a mixed Board decision . . . ").

QUESTIONS PRESENTED – Continued

structure controls every phase and feature of the adjudicatory process. *Id.* at 1205-06.

In the wake of *Henderson*, this Court granted petitioner's first petition for a writ of certiorari, vacated the judgment of the Federal Circuit and remanded the matter (hereafter "GVR order"). App. 57.

On remand, the Federal Circuit affirmed its earlier opinion. In a split decision, the Circuit reasoned that the precedential reach of *Henderson* was limited to the issue it decided: the non-jurisdictional nature of § 7266(a). App. 13-14. As such, *Henderson*'s overarching theme – the VA's pro-claimant design – did not inform the statutory interpretation of a *final decision*, the operative term of § 7266(a). *Id*.

The majority opinion also decided that the Board had authority to designate its mixed decisions as *final decisions* for purposes of requiring mandatory judicial appeals, citing Rule 54(b) of the Federal Rules of Civil Procedure as "an instructive model." App. 10.

The questions presented are:

I) Did the Federal Circuit properly limit *Henderson*'s analysis of the VA's pro-claimant structure to the specific issue it decided; or, should the Federal Circuit have held, as the language of *Henderson* and the Court's prior GVR order suggest, that the VA's pro-claimant design – often expressed as the rule of

QUESTIONS PRESENTED – Continued

solicitude for veterans – is a cardinal canon of construction for *all* VA provisions and procedures?

II) Do adjudicatory agencies, like the VA disability system, have the authority to designate its non-final adjudications as *final decisions* for purposes of requiring mandatory judicial appeals, absent a provision comparable to Rule 54(b) of the Federal Rules of Civil Procedure?

PARTIES TO THE PROCEEDING

Petitioner is Larry G. Tyrues, a veteran of the Persian Gulf conflict and the claimant in the present VA proceeding. Respondent is Eric K. Shinseki, the Secretary of Veterans Affairs.

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PETITION FOR A WRIT OF CERTIORARI

Larry G. Tyrues respectfully petitions for a writ of certiorari to review the judgment of the Federal Circuit.

OPINIONS BELOW

The Federal Circuit opinions (App. 1-44, 58-67) are reported at 732 F.3d 1351 and 631 F.3d 1380, respectively. The opinions of the Veterans Court (App. 45-56, 68-145) are reported at 26 Vet.App. 31 and 23 Vet.App. 166, respectively. The Board decisions of September 29, 1998 and April 7, 2004 (App. 146-77) are unreported.

JURISDICTION

The Federal Circuit entered judgment on October 10, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND FEDERAL RULE INVOLVED

Section 7266(a) of Title 38 of the United States Code sets forth the time period for filing a notice of appeal to the Veterans Court from a *final* Board decision:

> In order to obtain review by the Court of Appeals for Veterans Claims of a *final decision* of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

§ 7266(a) (2012) (italics added).

Under specified circumstances, Rule 54(b) of the Federal Rules of Civil Procedure authorizes federal district courts to designate as *final judgments* otherwise non-final decisions and orders:

> Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed.R.Civ.P. 54(b) (2010).

PROCEEDINGS BELOW

Petitioner Larry G. Tyrues served on active duty in the United States Army from September 1969 to April 1971, and from September 1990 to May 1991, including service in the Persian Gulf conflict. App. 59. In March 1995, petitioner filed a VA claim seeking compensation for lung disorder. App. 165, 70. Initially, the Board considered a theory of direct service-connection under 38 U.S.C. § 1110. *Id*. 171, 172. At the suggestion of a VA Board member, petitioner later asserted a theory of presumptive service-connection under 38 U.S.C. § 1117 in support of the same claim. *Id*. 3-4.

In September 1998, the Board denied entitlement to service-connected benefits for lung disorder on the theory of direct service-connection, but remanded the claim on an alternate theory of presumptive service-connection. *Id.* 172, 172-76. Petitioner, then unrepresented by counsel, did not appeal this decision to the Veterans Court. *Id.* 5, 163.

Following the September 1998 Board remand, in April 2004, the Board denied the lung disorder claim on the remaining theory of presumptive service-connection. *Id.* 149. Petitioner then appealed the denial of the lung disorder claim to the Veterans Court, raising both direct and presumptive theories of service-connection. In November 2005, the Veterans Court affirmed the 1998 Board denial of the lung claim on the direct service-connected theory, but declined review of the 2004 Board denial of the

presumptive service-connected theory. The Federal Circuit vacated the Veterans Court's November 2005 judgment to dismiss and remanded the matter for reconsideration to the Veterans Court. App. 5-6.

The Veterans Court, in an en banc split decision, concluded that "a final Board decision denying VA disability compensation based upon direct service connection, while the consideration of benefits based upon presumptive service-connection is still under adjudication, constitutes a final decision subject to separate appeal to the Court." App. 89-90. Thus, by failing to appeal the Board's 1998 decision within 120 days under 38 U.S.C. § 7266(a), petitioner forfeited his right to challenge the Board's denial of the direct service-connected theory in any subsequent appeal to the Veterans Court. *Id.*

Petitioner appealed to the Federal Circuit. On February 11, 2011, the Federal Circuit affirmed the Veterans Court's decision, holding that a Board decision adjudicating one or more but not all theories of a claim – a mixed Board decision – must be appealed within the 120-day time frame. *Id*. 58-67.

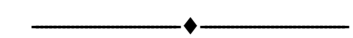
In March 2011, this Court decided *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), holding that the 120-day deadline of § 7266(a) is non-jurisdictional.

Petitioner then filed his first petition for a writ of certiorari, arguing that *Henderson* resolved the present question in favor of veterans: namely, appeals from mixed Board decisions should be considered interlocutory and discretionary. App. 22-23. The Court granted

the petition, vacating the judgment of the Federal Circuit and remanding the case to the Federal Circuit for further consideration in light of *Henderson*. App. 57 reported at 132 S. Ct. 75 (2011) (GVR order).

In April 2012, the Federal Circuit, in turn, remanded the case to the Veterans Court. In August 2012, the Veterans Court, again sitting en banc, affirmed its previous en banc decision. App. 45-56.

Petitioner appealed to the Federal Circuit, which affirmed the Veterans Court's decision. *Id*. 1-44. This second petition for a writ of certiorari now follows.



STATEMENT

a) A veteran begins a VA disability proceeding by filing a claim. By regulation, a claim is defined as "a formal or informal written communication requesting a determination of entitlement . . . to a benefit." 38 C.F.R. § 3.1(p) (2012).

In plain terms, a claim seeks compensation for a specific disability, injury or condition allegedly incurred during or caused by a claimant's military service. *Rice v. Shinseki*, 22 Vet.App. 447, 452 (2009) ("When a veteran submits an application for benefits to VA, it may, as VA's definition makes evident, encompass many claims; that is, each assertion of entitlement to benefits based on a specific disability that is the result of a distinct cause is a separate claim for disability compensation."); 38 C.F.R. § 3.303(a) (2012)

("Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. . . .").

In support of a single claim are one or more legal and/or factual theories. A "theory is defined as a means of establishing entitlement to a benefit for a disability, and if the theories all pertain to the same benefit for the same disability, they constitute the same claim." *Hillyard v. Shinseki*, 24 Vet.App. 343, 355 (2011) (citations and internal quotations omitted). As such, theories run with the claim, having no independent existence or function. *Robinson v. Peake*, 21 Vet.App. 545, 551 (2008) ("The proposition that separate theories in support of a claim for benefits for a particular disability equate to separate claims for benefits for that disability is no longer good law."), *aff'd* sub nom., *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

For example, a claimant seeking benefits for multiple sclerosis (MS) can succeed on a theory of direct service-connection (requiring proof of causation or aggravation of MS related to service)[2] or on a theory of presumptive service-connection (requiring proof of manifestation of MS to a disabling degree of ten percent or more within seven years of military

[2] 38 U.S.C. § 1131; 38 C.F.R. § 3.303 (2012).

discharge).[3] Under VA law, there is only one claim for service-connected MS, supported by two theories of entitlement. *Bingham v. Principi*, 18 Vet.App. 470, 474 (2004) (distinguishing between a "claim" and a "theory" by stating that "direct and presumptive service-connection are, by definition, two means (i.e., two *theories*) by which to reach the same end, namely service connection"), *aff'd*, 421 F.3d 1346 (Fed. Cir. 2005).

This distinction between a claim and its theories is pivotal in determining whether a Board decision is *final* under 38 U.S.C. § 7266(a). A Board decision is not final unless a claim has been decided in its entirety. *Roebuck v. Nicholson*, 20 Vet.App. 307, 314 (2006) ("finality attached once the Board denied [the] claim for a lung disability, not after it decided one of two bifurcated theories"). As Judge Newman explained in her dissent, if the Board splits a claim into two or more theories, "[a] ruling as to one theory accompanied by remand to resolve a second theory is not a complete adjudication of the claim." App. 33.

And, as Judge Newman opined and as petitioner now argues, an appeal from a non-final mixed Board decision should be treated as a discretionary interlocutory appeal. *See Brownlee v. DynCorp.*, 349 F.3d 1343, 1347-49 (Fed. Cir. 2003) (providing for discretionary interlocutory appeals from non-final agency

[3] 38 U.S.C. §§ 1112, 1113, 1137; 38 C.F.R. § 3.307 (2012).

decisions).[4] The Board's adjudicatory authority compels this result, as the Board may reject or accept theories, but only in terms of deciding individual claims. *Compare Maggitt v. West*, 202 F.3d 1370, 1376-77 (Fed. Cir. 2000) ("section 7252 confers authority on the Veterans Court to 'affirm, modify or reverse a decision of the Board. . . .' 38 U.S.C. § 7252(a) (1994). This authority also speaks to the Board's decision on the veteran's claim itself, not to an argument made or not made in support of the claim"); *Bingham v. Nicholson*, 421 F.3d 1346, 1348-49 (2005) ("finality attaches once a claim for benefits is disallowed, not when a particular theory is rejected").

b) In the present case, petitioner sought compensation for respiratory disorder, *i.e.*, a singular

[4] The Circuit majority determined that *Brownlee* (which allows for discretionary interlocutory appeals from partially adjudicated claims) did not apply to appeals from mixed Board decisions. Among other things, the majority reasoned: 1) the appeal provision of *Brownlee* provided for permissive appeals, whereas § 7266(a) does not; and 2) *Brownlee*'s provision did not address the consequences of failing to appeal a final Board decision, whereas § 7266(a) does. App. 14-15. The majority's analysis is untenable. To begin with, neither provision addresses the consequences of failing to appeal a final Board decision. And, the majority failed to follow Circuit precedent, which interpreted the appeal provision in *Brownlee* as mandatory and jurisdictional. *Placeway Const. Corp. v. United States*, 713 F.2d 726, 728 (Fed. Cir. 1983) ("The 120-day deadline imposed by Congress defines the jurisdiction of this court to hear appeals from the various boards of contract appeals. . . . We have no authority to waive this statutorily imposed period[.]") (citation omitted).

claim for service-connected lung disability.[5] App. 165. The claim was divided into two theories: entitlement to service-connection on a direct basis under § 1110, and entitlement to service-connection on a presumptive basis under § 1117. In 1998, the Board rejected the § 1110 theory, but remanded the claim on the § 1117 theory, resulting in what the Federal Circuit majority described as a "mixed decision." App. 8. Petitioner did not appeal the Board decision within the 120-day period of § 7266(a), but waited until the Board denied the remaining theory in its 2004 decision. Petitioner then appealed both Board decisions to the Veterans Court. The Veterans Court ruled that the appeal of the first Board decision was untimely. In a split decision, the Federal Circuit affirmed the Veterans Court's opinion, holding that the Board's earlier decision was final, and, as such, petitioner had forfeited his right to appeal the § 1110 theory of the claim:

> When the Board renders a clear definitive denial of benefits as part of a mixed decision, we further conclude, the veteran not only can appeal immediately, but must bring any appeal from the denial portion within the 120-day period allowed by statute. Such a denial is a "final decision," as explained above, not an interlocutory decision.

App. 12.

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[5] Because of the breadth of its opinion, the Veterans Court did not decide the question whether petitioner had presented two separate claims or two theories in support of a single claim. App. 79.

In her dissent, Judge Newman discussed the incongruity and impracticality of the majority opinion. Requiring an immediate appeal from a partially adjudicated claim, Judge Newman observed, creates an anomaly in Circuit procedure, undermines judicial and administrative efficiency and unfairly prejudices disabled veterans:

> The limitation to a single claim for benefits is not inconsistent with the understanding that service connection for certain disorders can be either direct or presumptive. *Combee v. Brown*, 34 F.3d 1039, 1043 (Fed. Cir. 1994). The veteran need only demonstrate one theory of service connection to have a "well-grounded claim." *Schroeder*, 212 F.3d at 1270-71. The BVA's 1998 ruling that Mr. Tyrues had not proven direct service connection by a preponderance of evidence was not a complete and final adjudication of his claim for a service connected lung disorder, because respiratory symptoms of Persian Gulf Syndrome are the subject of a statutory presumption of service connection. His assertion of either or both direct and presumptive theories of service connection is a claim for the same disorder. *See Bingham*, 421 F.3d at 1348 (separate theories are not separate claims). A ruling as to one theory accompanied by remand to resolve a second theory is not a complete adjudication of the claim.
>
> * * *
>
> Although the panel majority proposes otherwise, prior to Mr. Tyrues' case the Federal

> Circuit has never held that a litigant must immediately appeal part of an incomplete decision, or lose the right to appeal that part after final judgment.
>
> * * *
>
> Under [the majority's] rule, veterans will be forced to incur the time and expense of appealing every partial decision of the BVA to preserve rights, even if such decision would be mooted by the remand aspect. The court's ruling will be of wide impact, for the BVA not infrequently remands aspects of a claim to the Regional Office while disposing of other aspects. Today's requirement of immediate partial appeal serves neither efficiency nor fairness, while adding complexity and cost and time to determination of veterans' concerns.

App. 32-33, 35, 41.

REASONS FOR GRANTING THE PETITION

I) *Henderson* & the VA's Pro-Claimant System

The Federal Circuit opinion strikes at the heart of the VA system in two respects: one practical and the other jurisprudential. As to the first, the Board's practice of splitting unitary claims into separate theories and then adjudicating each theory piecemeal presents complex and far-reaching procedural challenges to the VA system:

> The hard question presented by this case is how to handle VA's practice of bifurcating a single claim and adjudicating different theories separately. That is the question to which the system needs a clear answer. . . .
>
> [I]t is quite common to see a claim where the theories of direct, presumptive, or secondary service connection have been bifurcated. If the majority opinion is affirmed, the courts will eventually have to sort through the myriad of ugly procedural issues that arise under Title 38 when the statutory term "claim" does not actually mean "claim," at least some of the time. *See Tyrues I*, 23 Vet.App. at 195-96 (Lance, J., concurring in part and dissenting in part) (outlining several of the statutory interpretation problems created by the majority opinion). If the majority's opinion is rejected, then the system will need to adjust the handling of a large number of cases to conform to the new interpretation. Although the proper outcome may be debatable, no final resolution is certainly the worst possible outcome.

App. 54-55 (dis. & conc., J. Lance); App. 16 (dis. opn., J. Newman) ("This case presents a far-reaching ruling of procedural law specific to veterans cases"); App. 133-39 (dis. & conc., J. Hagel) (outlining the many procedural difficulties).

Among other things, this peculiar practice will confuse most *pro se* claimants about their appellate rights and obligations. App. 135 (dis. & conc., J.

Lance). ("It is much more likely that a pro se appellant will [ ] not understand that a Board decision that remands a claim as to some theories is still final as to the others. . . ."); *id*. 36-38 (dis. opn., J. Newman) (detailing the VA's confusing generic notice attached to the Board decision); *id.* 177 (Board's notice of appellate rights). But to add insult to injury, the Federal Circuit majority ruled that veterans, confused or not, will lose their appellate rights if they do not appeal the Board's piecemeal denial of each and every theory of a single claim.

This novel rule of finality, Judge Newman observed, conflicts not only with procedural law in general, but even more so with the pro-claimant, paternalistic character of the VA system:

> This court today holds that a veteran who is proceeding before a Regional Office and Board of Veterans Appeals (BVA) *must* take an immediate interlocutory appeal to the Veterans Court whenever the BVA decides part of a claim, even if the BVA remands to the Regional Office on a related aspect of the same claim. This court today holds that unless such partial appeal is taken, the veteran forfeits the right and opportunity to appeal that partially decided aspect or raise that argument after the BVA's final judgment. *This is incorrect procedural law in any context, and is particularly inapt as applied to veterans' claim procedure*.

App. 17 (italics added); *see Jaquay v. Principi*, 304 F.3d 1276, 1280 (Fed. Cir. 2002) (en banc) ("Congress's

paternalistic veterans' benefits system care[s] for those who served their country in uniform.").

Beyond practical considerations, the majority misunderstood the basic lesson of *Henderson*. More than anything, *Henderson* said that the VA's pro-claimant policy – its core founding principle – pervades the entire adjudicatory regime:

> *[W]hat is most telling here are the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims. The solicitude of Congress for veterans is of long standing. And that solicitude is plainly reflected in the VJRA, as well as in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions*, . . .
>
> The contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic. In ordinary civil litigation, plaintiffs must generally commence their suits within the time specified in a statute of limitations, . . . , and the litigation is adversarial. Plaintiffs must gather the evidence that supports their claims and generally bear the burden of production and persuasion. Both parties may appeal an adverse trial-court decision and a final judgment may be reopened only in narrow circumstances.

> By contrast, a veteran seeking benefits need not file an initial claim within any fixed period after the alleged onset of disability or separation from service. When a claim is filed, proceedings before the VA are informal and nonadversarial. The VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence, the VA must give the veteran the benefit of any doubt. If a veteran is unsuccessful before a regional office, the veteran may obtain *de novo* review before the Board, and if the veteran loses before the Board, the veteran can obtain further review in the Veterans Court. A Board decision in the veteran's favor, on the other hand, is final. And even if a veteran is denied benefits after exhausting all avenues of administrative and judicial review, a veteran may reopen a claim simply by presenting "new and material evidence." Rigid jurisdictional treatment of the 120-day period for filing a notice of appeal in the Veterans Court would clash sharply with this scheme.
>
> *We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor. Particularly in light [of] this canon*, we do not find any clear indication that the 120-day limit was intended to carry the harsh consequences that accompany the jurisdiction tag.

131 S. Ct. at 1205-06 (internal citations and quotations omitted) (italics added); *see Shinseki v. Sanders*,

129 S. Ct. 1696, 1709 (2009) (dis. opn., J. Souter) ("a number of other provisions and practices of the VA's administrative and judicial review process reflect a congressional policy to favor the veteran"); H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95 (emphasizing the VA's historically non-adversarial disability benefits system and affirming Congress' intent to maintain the system's unique character); *see also Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275, 285 (1946) ("Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.").

Despite the Court's sweeping analysis, the Federal Circuit limited the precedential value of *Henderson* to the specific question it decided – the non-jurisdictional nature of § 7266(a), and the related question of equitable tolling:

> [T]he Supreme Court's decision in *Henderson* does not support a radically different rule under section 7266(a), namely, that a veteran has the discretion to file an appeal immediately or to wait until completion of all remand proceedings. The Supreme Court in *Henderson* relied in substantial part on Title 38's solicitude for veterans, 131 S. Ct. at 1205-06, *but the Court invoked that policy for a limited purpose*. *It held only that violations of section 7266(a)'s timing requirement might be excused for good reasons*, not that the rule

> could be disregarded at the veteran's discretion in the significant class of cases involving mixed decisions. The Veterans Court recognizes the availability of case-specific equitable tolling to excuse such violations, and this court has not understood *Henderson* to require more. Indeed, Mr. Tyrues's position that veterans have plenary discretion not to appeal (within 120 days) in all mixed Board decisions would be contrary to the Supreme Court's understanding of section 7266(a)'s timing requirement as an "important procedural rule." 131 S. Ct. at 1206.

App. 13-14 (italics added).

The majority's take on *Henderson*, Judge Newman countered, blinks its fundamental premise:

> The majority's holding that because a veteran *may* appeal from a partial BVA decision, he *must* immediately appeal, is not consistent with the policy embodied in the veterans' statutes, as reiterated by the Court in *Henderson*, 131 S. Ct. at 1206, that "We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."

App. 41-42; *compare Gonzales v. Raich*, 545 U.S. 1, 20 (2005) (holding that despite distinctions between a prior Supreme Court opinion and the case at bar, "[t]hose differences, though factually accurate, do not diminish the precedential force of this Court's reasoning" in the prior opinion).

This aside, the majority ignored the clear import of the Court's prior GVR order: namely, the Court would not have granted petitioner's earlier certiorari petition and remanded the matter for reconsideration under *Henderson*, if *Henderson* had no relevance beyond the question of jurisdiction and equitable tolling. Judge Newman explained:

> Today's ruling strains the Court's grant of certiorari and remand of Mr. Tyrues' appeal. My colleagues set the GVR aside, seeing "no basis for now reaching a different conclusion" from the prior decision, because Mr. Tyrues did not request the remedy of "equitable tolling." Maj. op. at 6, 11. However, *Henderson is not limited to equitable tolling. The Court's GVR of Mr. Tyrues' appeal is not reasonably construed as strictly limited to an argument that was not even included in the Tyrues cert. petition*. The GVR requires our consideration of how *Henderson* relates to the reasoning of *Tyrues II*. *See United States v. Holloway*, 630 F.3d 252, 258 (1st Cir. 2011) ("A Supreme Court opinion need not be directly on point to undermine one of our opinions."). Our prior reasoning that Mr. Tyrues' appeal of his argument for direct service connection was time barred because "Section 7266(a) is mandatory and jurisdictional," 631 F.3d at 1383, is negated by *Henderson*.

App. 42 (italics added).

II) Designating Non-Final Adjudications as Final Decisions Without a Provision Analogous to Fed.R.Civ.P. 54(b)

The majority held that the Board has the authority to designate its mixed decisions as *final decisions* in a similar manner as federal district courts may designate non-final decisions as *final judgments* under Rule 54(b) of the Federal Rules of Civil Procedure:

> [The rule requiring an immediate appeal from a mixed Board decision] finds support in the longstanding treatment of certain partial-case resolutions in the federal courts – not because that treatment directly controls, but because it supplies an instructive model for interpreting the provisions governing the analogous situation here. Under Fed. R. Civ. P. 54(b), a district court "may direct entry of a final judgment as to one or more, but fewer than all, claims or parties," upon "determin[ing] that there is no just reason for delay." Such an adjudication of some (but not all) claims is an appealable "final judgment" under 28 U.S.C. §§ 1291, 1295. *See*, *e.g.*, *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 76 S. Ct. 895, 100 L. Ed. 1297 (1956); *Spraytex, Inc. v. DJS&T*, 96 F.3d 1377 (Fed. Cir. 1996).
>
> Like a district court acting under Rule 54(b), the Board in the present context can determine that a denial portion of its ruling is definitive and sufficiently separate from a remand portion that it should be designated

as final and thus immediately appealable – as the Veterans Court found the Board did with unchallenged clarity in this case. *Tyrues*, 23 Vet. App. at 180-81. And like a district court's decision to enter a partial final judgment under Rule 54(b), the Board's clear designation of a denial as final is not conclusive on the reviewing tribunal. Whether on the claimant's motion under the Veterans Court's Rule 5(a)(3) or otherwise, the Veterans Court may decline to review the decision based on prudential or similar considerations, such as sufficient intertwining of the decided and remanded issues, *see Harris v. Derwinski*, *supra*,[6] as a federal appeals court may disagree with a district court's determination that there is no just reason for delay in entering an appealable judgment on some (but not all) claims. *See*, *e.g.*, 10 Charles A. Wright, et al., Federal Practice and Procedure § 2655 at 39-40 (3d ed. 1998) ("The fact that the district court files a Rule 54(b) certificate stating that those requirements have been satisfied is not conclusive [and] is fully reviewable by an appellate court."); *id.* § 2659 at 112 & n.18; *Transp. Workers Union of Am., Local 100, AFL-CIO v. N.Y.C. Transit Auth.*, 505 F.3d 226, 230 (2d Cir. 2007); *Gold Seal Co. v. Weeks*, 209 F.2d 802, 810-11,

[6] 1 Vet. App. 180 (1991).

93 U.S. App. D.C. 249, 1954 Dec. Comm'r Pat. 1 (D.C. Cir. 1954).

App. 9-11.

This analogy to Rule 54(b) does not fit the VA disability scheme. To begin with, the absence of a comparable provision to Rule 54(b) argues for the opposite conclusion. If Congress had wanted to give the Board the special authority it conferred upon district courts, it knew how and would have done so by specific provision, *see Henderson*, 131 S. Ct. at 1204-05 ("If Congress had wanted the 120-day time to be treated as jurisdictional, it could have cast that provision in language like that in the provision of the VJRA that governs Federal Circuit review of decisions of the Veterans Court."), or, at least by general reference to the Federal Rules of Civil Procedure. *Shepherd v. Commissioner*, 147 F.3d 633, 634-35 (7th Cir. 1998) (J. Posner) (observing that IRC § 7482(a)(1) and Rule 1(a) of the Rules of Practice and Procedure of the United States Tax Court referencing the Federal Rules of Civil Procedure, authorize the Tax Court to make Rule 54(b)-type orders).

Moreover, there is little, if any, structural similarity between VA adjudication and civil litigation. VA procedural and substantive laws are quite different from those governing civil litigation; a district court functions quite differently from the Board of Veterans' Appeals. *Compare*, *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (conc. opn., J. Michel). ("The Board of Veterans' Appeals, of course, is not a trial court and the Court of Veterans Appeals, while

surely an appellate court, is an Article I court set in a *sui generis* adjudicative scheme for awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend their country."); *Henderson*, 131 S. Ct. at 1205-06 (noting the dramatic difference between ordinary civil litigation and VA adjudication) *with Shepherd*, 147 F.3d at 635 (noting that Rule 54(b) should apply because "identical tax disputes can be litigated in either the Tax Court or the district court").

And, as a general matter, the Federal Rules of Civil Procedure apply only to the federal district courts. *See Int'l Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) ("Federal Rules of Civil Procedure, of course, apply only in the federal district courts."); Fed.R.Civ.P. 1 (2010) ("These rules govern the procedure in the United States district courts. . . .").

CONCLUSION

For the reasons stated, petitioner asks that his petition for a writ of certiorari be granted.

Respectfully submitted,

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Tyrues v. Shinseki

2013-7007

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

732 F.3d 1351; 2013 U.S. App. LEXIS 20615

October 10, 2013, Decided

COUNSEL: MARK R. LIPPMAN, The Veterans Law Group, of La Jolla, California, argued for claimant-appellant.

MARTIN F. HOCKEY, JR., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent-appellee. With him on the brief were STUART F. DELERY, Principal Deputy Assistant Attorney General, JEANNE E. DAVIDSON, Director, and TODD M. HUGHES, Deputy Director. Of counsel on the brief were MICHAEL J. TIMINSKI, Deputy Assistant General Counsel, and MARTIE ADELMAN, Attorney, United States Department of Veterans Affairs, of Washington, DC.

JUDGES: Before NEWMAN, LOURIE, and TARANTO, Circuit Judges. Opinion for the court filed by Circuit Judge TARANTO. Dissenting opinion filed by Circuit Judge NEWMAN.

OPINION BY: TARANTO

OPINION

TARANTO, *Circuit Judge.*

Larry G. Tyrues, a veteran of the United States Army who served in the Persian Gulf, sought disability benefits under two different standards. In September 1998, the Board of Veterans' Appeals rejected his claim to benefits under 38 U.S.C. § 1110, because his lung condition lacked the required service connection, but remanded to the Department of Veterans' Affairs Regional Office for further consideration of whether his chronic symptoms manifested Persian Gulf Syndrome, which might have entitled him to benefits under standards then in regulations but soon enacted as 38 U.S.C. § 1117. Mr. Tyrues did not appeal to the Court of Appeals for Veterans Claims from the Board's September 1998 decision until more than 5 years later.

In April 2004, after the remand, the Board decided that Mr. Tyrues was not entitled to benefits pursuant to section 1117. At that point, Mr. Tyrues asked the Veterans Court to review both the April 2004 denial under section 1117 and the September 1998 denial under section 1110. The Veterans Court dismissed the part of his appeal that challenged the September 1998 Board decision, ruling that Mr. Tyrues (a) missed the 120-day deadline for appealing that decision, 38 U.S.C. § 7266(a), and (b) presented no basis for equitable tolling under *Henderson v. Shinseki*, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011). Concluding that the Veterans Court correctly interpreted 38 U.S.C. § 7266(a), we now affirm, as we did when the Veterans Court earlier reached the same untimeliness decision, before *Henderson*, without

considering equitable tolling. *See Tyrues v. Shinseki*, 631 F.3d 1380 (Fed. Cir.), *vacated and remanded in light of Tyrues*, 132 S. Ct. 75 (2011).

BACKGROUND

Mr. Tyrues served his country in the United States Army in the Persian Gulf from November 1990 to May 1991. In March 1995, shortly after being hospitalized for pneumonia, Mr. Tyrues sought benefits for a lung disability pursuant to 38 U.S.C. § 1110, which provides for payment of compensation based on disabilities that result from a personal injury suffered or disease contracted in the line of duty. A veteran entitled to receive benefits under section 1110 is said to have a disability with a direct service connection.

While his entitlement to disability benefits under section 1110 was pending, Mr. Tyrues appeared at a hearing before a Board member to discuss the condition of his lungs. During the hearing, Mr. Tyrues said that other soldiers who had served in the Persian Gulf were experiencing chronic medical symptoms similar to his. The Board member responded that "[t]hat's not really relevant" under section 1110 but that Mr. Tyrues should "certainly file a claim" seeking benefits for Persian Gulf Syndrome under standards, then embodied in regulations but about to be codified in section 1117, that afford a presumption of service connection in certain circumstances. Six days later, Mr. Tyrues amended his claim for disability benefits to identify chronic symptoms associated with Persian

Gulf Syndrome, including aching joints, memory loss, and a stomach condition.

In September 1998, the Board denied Mr. Tyrues disability compensation under section 1110. The entirety of the "Order" section of the decision stated: "The claim for entitlement to service connection for a lung disorder on a direct basis is denied." In the distinct "Remand" portion of its decision, the Board sent Mr. Tyrues's case back to the Regional Office for additional development of evidence on whether Mr. Tyrues's "chronic disorder manifested by shortness of breath, due to undiagnosed illness," was entitled to a presumptive service connection as Persian Gulf Syndrome.

The Board decision informed Mr. Tyrues of his appellate rights:

> NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 . . . , a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision. . . . Appellate rights do not attach to those issues addressed in the remand portion of the Board's decision, because a remand is in the nature of a preliminary order and does not constitute a decision of the Board on the merits of your appeal.

The Board also attached a separate notice of appellate rights, which told Mr. Tyrues:

> The attached decision by the Board . . . is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

(Emphasis in original.) The notice informed Mr. Tyrues of how to appeal and said:

> You have 120 days from the date this decision was mailed to you . . . to file a Notice of Appeal with the United States Court of Appeals for Veterans Claims.

Mr. Tyrues did not file an appeal within 120 days.

In April 2004, the Board decided that Mr. Tyrues was not entitled to section 1117's presumption of service connection for Persian Gulf veterans. Mr. Tyrues then sought review in the Veterans Court of both the April 2004 denial of benefits under section 1117 and the September 1998 denial of benefits under section 1110.

In November 2005, the Veterans Court affirmed the April 2004 decision but held that it lacked jurisdiction to review the Board's September 1998 decision because, as to that decision, Mr. Tyrues failed to comply with the mandate of 38 U.S.C. § 7266(a) that a veteran "shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed." *Tyrues v. Nicholson*, 20 Vet. App. 231 (2005). After this court remanded for reconsideration on the Secretary's motion, *Tyrues v. Peake*, 273 F. App'x 921 (Fed. Cir. 2008), the Veterans Court, acting en banc, again dismissed Mr. Tyrues's appeal of the Board's September 1998 decision for lack of jurisdiction. *Tyrues v. Shinseki*, 23 Vet. App. 166 (2009). This court then affirmed the Veterans Court. *Tyrues v. Shinseki*, 631 F.3d 1380 (Fed. Cir. 2011).

A few weeks later, the Supreme Court held in *Henderson v. Shinseki* that the 120-day filing deadline in section 7266(a), though "an important procedural rule," "does not have jurisdictional attributes." 131 S. Ct. 1197, 1206, 179 L. Ed. 2d 159 (2011). The Supreme Court then granted Mr. Tyrues's petition for certiorari, vacated this court's judgment, and remanded for further consideration in light of *Henderson*. *Tyrues v. Shinseki*, 132 S. Ct. 75, 181 L. Ed. 2d 2 (2011). This court in turn vacated the Veterans Court's judgment and remanded for consideration of whether the non-jurisdictional nature of section 7266(a) should lead to a different result. *Tyrues v. Shinseki*, 467 F. App'x 889, 890 (Fed. Cir. 2012). The Veterans Court thereafter held that it still must

dismiss the appeal from the September 1998 decision, because Mr. Tyrues advanced no basis for equitable tolling of the 120-day clock in his case. *Tyrues v. Shinseki*, 26 Vet. App. 31, 33-34 (2012).

Mr. Tyrues timely petitioned this court for review of the Veterans Court's decision under 38 U.S.C. § 7292(a).

DISCUSSION

This court's jurisdiction to review decisions of the Veterans Court is limited. *See* 38 U.S.C. § 7292. We have jurisdiction to decide appeals insofar as they challenge the validity of a decision of the Veterans Court with respect to a rule of law, including the interpretation or validity of any statute or regulation. *Id.* § 7292(a), (d)(1). We do not have jurisdiction to review a challenge to a factual determination or a challenge to a law or regulation as applied to the facts of a particular case where, as here, the challenge presents no constitutional issue. *Id.* § 7292(d)(2).

Mr. Tyrues's appeal presents two related issues of statutory interpretation: When the Board has clearly rejected a request for benefits under one statutory standard and designated that rejection as subject to immediate appeal, while separately remanding the matter for consideration of the claimant's request for benefits on other statutory grounds, (1) can the denial be appealed immediately, *i.e.*, without waiting for completion of the remand, and (2) must the denial be appealed immediately, *i.e.*, within the 120

days specified in section 7266(a), in the absence of equitable tolling? In our earlier decision, now vacated, we addressed and answered affirmatively the same questions, though without the equitable-tolling qualifier: "whether the non-remanded portion of a mixed decision from the Board is final for the purposes of § 7266(a) and must be appealed within 120 days from the date of judgment." 631 F.3d at 1383. We see no basis for now reaching a different conclusion, subject only to the addition of the *Henderson*-based equitable-tolling qualifier. With no issue before us on the case-specific matter of inapplicability of equitable tolling to Mr. Tyrues, we therefore affirm.

A

Neither party disputes that a veteran can immediately appeal a mixed Board decision – a decision that definitively denies benefits on one statutory ground while remanding for consideration of entitlement to benefits on another ground. The statute supports that position.

Section 7266(a) provides for "review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals." A decision of the Board is an order that either grants or denies benefits sought by the veteran. *See id.* § 7104(d) (requiring that each "decision" of the Board either "grant[ ] appropriate relief or deny[ ] relief"); *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000) ("A 'decision' of the Board . . . is the decision with respect to the

benefit sought by the veteran: those benefits are either granted . . . or they are denied."). And this court and the Veterans Court, considering the policies specific to this statutory context, have long held that a decision definitively denying certain benefits – here, it is undisputed that the Board definitively denied benefits under section 1110 – is a "final" decision under section 7266(a), despite the simultaneous remand of issues concerning receipt of benefits on other statutory grounds, where immediate "judicial review will not disrupt the orderly process of adjudication." *See Elkins v. Gober*, 229 F.3d 1369, 1373 (Fed. Cir. 2000).

Consequently, the denial portion of a mixed decision is a final decision available for Veterans Court review where the Board makes clear the finality of that denial, although the Veterans Court is able to dismiss the appeal on the ground that immediate review would disrupt orderly adjudication, as where the denial portion is "inextricably intertwined" with the portion ordering a remand. *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991) (refusing to exercise jurisdiction over an appeal that was "inextricably intertwined" with an issue undecided and pending before the Regional Office).

This rule not only fits the statutory language and context but enables the Board's own rulings to provide the clarity that is desirable in a busy adjudicatory system. And it finds support in the longstanding treatment of certain partial-case resolutions in the federal courts – not because that treatment directly

controls, but because it supplies an instructive model for interpreting the provisions governing the analogous situation here. Under Fed. R. Civ. P. 54(b), a district court "may direct entry of a final judgment as to one or more, but fewer than all, claims or parties," upon "determin[ing] that there is no just reason for delay." Such an adjudication of some (but not all) claims is an appealable "final judgment" under 28 U.S.C. §§ 1291, 1295. *See*, *e.g.*, *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 76 S. Ct. 895, 100 L. Ed. 1297 (1956); *Spraytex, Inc. v. DJS & T*, 96 F.3d 1377 (Fed. Cir. 1996).

Like a district court acting under Rule 54(b), the Board in the present context can determine that a denial portion of its ruling is definitive and sufficiently separate from a remand portion that it should be designated as final and thus immediately appealable – as the Veterans Court found the Board did with unchallenged clarity in this case. *Tyrues*, 23 Vet. App. at 180-81. And like a district court's decision to enter a partial final judgment under Rule 54(b), the Board's clear designation of a denial as final is not conclusive on the reviewing tribunal. Whether on the claimant's motion under the Veterans Court's Rule 5(a)(3) or otherwise, the Veterans Court may decline to review the decision based on prudential or similar considerations, such as sufficient intertwining of the decided and remanded issues, *see Harris v. Derwinski*, *supra*, as a federal appeals court may disagree with a district court's determination that there is no just reason for delay in entering an appealable judgment on some

(but not all) claims. *See*, *e.g.*, 10 Charles A. Wright, et al., Federal Practice and Procedure § 2655 at 39-40 (3d ed. 1998) ("The fact that the district court files a Rule 54(b) certificate stating that those requirements have been satisfied is not conclusive [and] is fully reviewable by an appellate court."); *id.* § 2659 at 112 & n.18; *Transp. Workers Union of Am., Local 100, AFL-CIO v. N.Y.C. Transit Auth.*, 505 F.3d 226, 230 (2d Cir. 2007); *Gold Seal Co. v. Weeks*, 209 F.2d 802, 810-11, 93 U.S. App. D.C. 249, 1954 Dec. Comm'r Pat. 1 (D.C. Cir. 1954).

This interpretation of section 7266(a) favors the veteran in at least two ways. First, it enables the veteran simply to follow express and unequivocal appealability directives from the Board, whose obligation in this setting, as elsewhere in the Title 38 scheme, is to do all it can to provide clear guidance as to what it expects of the veteran. Uncertainty as to finality can both encourage premature attempts to appeal the unappealable and cause the failure to appeal the appealable. Predicating appealability on the Board's unambiguous instructions provides clarity. The Veterans Court thus did not rely on an incorrect rule of law in founding jurisdiction on a clear Board appealability statement, without resolving a dispute about whether Mr. Tyrues had one or more than one "claim" – a term that is in Rule 54(b) but not in section 7266(a). *Tyrues*, 23 Vet. App. at 172. Second, allowing the immediate appeal, subject to Veterans Court determinations of reasons not to proceed, makes possible quick correction of erroneous

denials, *see Elkins*, 229 F.3d at 1375, while permitting oversight for systemic efficiency, as this court explained in its earlier, now-vacated decision in this case. *Tyrues*, 631 F.3d at 1384.

B

When the Board renders a clear definitive denial of benefits as part of a mixed decision, we further conclude, the veteran not only can appeal immediately, but must bring any appeal from the denial portion within the 120-day period allowed by statute. Such a denial is a "final decision," as explained above, not an interlocutory decision. And section 7266(a) declares that, "[i]n order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision *shall file* a notice of appeal with the Court *within 120 days* after the date on which notice of the decision is mailed." 38 U.S.C. § 7266(a) (emphasis added). The plain meaning of that language, moreover, fits with the analogous law governing a Rule 54(b) partial final judgment, which must be appealed within the time allowed for appealing any "final judgment" and cannot await completion of the rest of the litigation. *See*, *e.g.*, *Brown v. Eli Lilly and Co.*, 654 F.3d 347, 354 (2d Cir. 2011) (dismissing for failure to timely appeal after entry of a Rule 54(b) judgment); *In re Lindsay*, 59 F.3d 942, 951 (9th Cir. 1995) ("A Rule 54(b) judgment does not give the

prospective appellant an election to appeal at that time or later, when the entire case is over.").[1] As noted above, the appellate tribunal may decide not to proceed with the appeal (on request or *sua sponte*), but the appeal must be filed.

Contrary to Mr. Tyrues's contention, the Supreme Court's decision in *Henderson* does not support a radically different rule under section 7266(a), namely, that a veteran has the discretion to file an appeal immediately or to wait until completion of all remand proceedings. The Supreme Court in *Henderson* relied in substantial part on Title 38's solicitude for veterans, 131 S. Ct. at 1205-06, but the Court invoked that policy for a limited purpose. It held only that violations of section 7266(a)'s timing requirement might be excused for good reasons, not that the rule could be disregarded at the veteran's discretion in the

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[1] *See also Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 516, 70 S. Ct. 322, 94 L. Ed. 299 (1950) ("We hold the decree . . . to have been a final one as to Petroleum and one from which it could have appealed and that its failure to appeal therefrom forfeits its right of review."); *Hill v. Chicago & E. R. Co.*, 140 U.S. 52, 55, 11 S. Ct. 690, 35 L. Ed. 331 (1891) (refusing to consider, on appeal of a later judgment in the same suit, a party's concurrent challenge to a **prior** judgment, which was not timely appealed, but was "appealable as to the matters which it fully determined"); Richard J. Pierce, Jr., Administrative Law Treatise § 11.7 (5th ed. 2010) (warning that, when seeking judicial review of agency action, "if a party waits until the agency has taken a subsequent action, a court might dismiss the petition as untimely if it concludes that the action was reviewable at an earlier time.").

significant class of cases involving mixed decisions. The Veterans Court recognizes the availability of case-specific equitable tolling to excuse such violations, and this court has not understood *Henderson* to require more. Indeed, Mr. Tyrues's position that veterans have plenary discretion not to appeal (within 120 days) in all mixed Board decisions would be contrary to the Supreme Court's understanding of section 7266(a)'s timing requirement as an "important procedural rule." 131 S. Ct. at 1206.

Mr. Tyrues's position also cannot be soundly supported by this court's decision in *Brownlee v. DynCorp.*, 349 F.3d 1343 (Fed. Cir. 2003), which this court distinguished in its now-vacated 2011 ruling in this case, *Tyrues*, 631 F.3d at 1384-85. *Brownlee* held that, when the Armed Services Board of Contract Appeals has determined that the claimant is entitled to relief, an appeal of that determination could either be brought immediately to this court or await completion of the determination of monetary relief on that very claim. Thus, *Brownlee* did not involve the scenario involved here (or under Rule 54(b)); *i.e.*, it did not involve a completed adjudication of a particular claim for relief, but separation of liability and quantification determinations. And there are meaningful differences in statutory language and context.

The section of the Contract Disputes Act relevant in *Brownlee* uses permissive language in stating that a Board of Contract Appeals decision is final except that "a contractor *may appeal* the decision to the United States Court of Appeals for the Federal

Circuit within 120 days." 41 U.S.C. § 7107(a) (emphasis added). And the jurisdictional provision of this court that was relevant in *Brownlee*, 28 U.S.C. § 1295(a)(10), does not address the consequences of a failure to appeal from a final Board of Contract Appeals decision. *Brownlee* thus involved no statutory command as stark as section 7266(a)'s rule that, "[i]n order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' appeals, a person adversely affected by such a decision shall file a notice of appeal with the Court within 120 days."

The Contract Disputes Act context is also quite different from the present context. There are roughly two hundred times more appeals from the Board of Veterans' Appeals each year than there are from the Board of Contract Appeals. *Compare* United States Court of Appeals for the Federal Circuit, Appeals Filed, Terminated, and Pending (2012), *available at* www.cafc.uscourts.gov/the-court/statistics.html (reporting 17 appeals filed from the Board of Contract Appeals during the twelve-month period ending September 30, 2012) *with* United States Court of Appeals for Veterans Claims, Annual Report (2012), *available at* www.uscourts.cavc.gov/report.php (reporting 3,649 appeals from the Board of Veterans' Appeals during same period). The policies relevant to handling a trickle of appeals that involve commercial entities do not readily carry over to a large-scale system of adjudication that involves individual claimants and affirmatively seeks to provide benefits

authorized by law as quickly as possible. *Brownlee* thus does not justify a result different from the result otherwise warranted in this case: final decisions that are part of mixed decisions must be appealed within the 120-day period specified in section 7266(a), subject to equitable tolling.

CONCLUSION

Because the Veterans Court correctly interpreted section 7266(a), and because it found no basis for equitable tolling of that provision's 120-day rule in this case, we affirm the Veterans Court's dismissal of the April 2004 appeal of the September 1998 Board decision.

No costs.

AFFIRMED

DISSENT BY: NEWMAN

DISSENT

NEWMAN, *Circuit Judge*, dissenting.

This case presents a far-reaching ruling of procedural law specific to veterans' cases, where a vast agency administers the nation's laws affecting the population of war veterans.

No aspect of this case offers the "unchallenged clarity" seen by my colleagues. The very nature of

Veteran Tyrues' "claim," which has been pending since 1995, is the subject of three Veterans Court decisions, two Federal Circuit decisions, and a "grant of certiorari, vacate, and remand" (GVR) from the Supreme Court.

This court today holds that a veteran who is proceeding before a Regional Office and Board of Veterans Appeals (BVA) *must* take an immediate interlocutory appeal to the Veterans Court whenever the BVA decides part of a claim, even if the BVA remands to the Regional Office on a related aspect of the same claim. This court today holds that unless such partial appeal is taken, the veteran forfeits the right and opportunity to appeal that partially decided aspect or raise that argument after the BVA's final judgment. This is incorrect procedural law in any context, and is particularly inapt as applied to veterans' claim procedure. I respectfully dissent.

Veteran Tyrues' pulmonary claim

The procedural facts of this case are as follows: Mr. Tyrues suffers from chronic respiratory symptoms including shortness of breath and severe persistent lung infection. In 1995 he filed a claim for service connected pulmonary disability based on his exposure to dust, fumes, kerosene and other irritants during his service in the Persian Gulf War. The BVA held in 1998 that he had not proven the medical facts of direct service connection under 38 U.S.C. § 1110, and remanded to the Regional Office for determination of

whether he met the criteria of 38 U.S.C. § 1117 *et seq.*, which provide a statutory presumption of service connection for Persian Gulf War veterans for "undiagnosed" or "unexplained" disabilities, including "symptoms involving the upper or lower respiratory system." In accordance with this presumption, signs and symptoms of respiratory illness "shall be considered to have been incurred in or aggravated by service . . . , notwithstanding that there is no record of evidence of such illness during the period of such service." 38 U.S.C. § 1118(a).

In a Board decision dated September 29, 1998, the BVA described the "issue" of Mr. Tyrues' claim as follows:

> ISSUE: Entitlement to service connection for a lung disorder, including service connection for chronic disorder manifested by shortness of breath due to an undiagnosed illness, claimed as secondary to Persian Gulf War service.

1998 Bd. op. at 1. The BVA's decision separated the issue into two components: entitlement to service-connected lung disorder on a direct basis under § 1110, and entitlement to service-connected respiratory symptoms on a presumptive basis under § 1117. The Board rejected the § 1110 basis, finding "no competent evidence that the veteran currently suffers from a lung disorder," but remanded to the Regional Office under § 1117, stating that:

> As the record stands, it is unclear whether there is medical evidence to support the veteran's claimed respiratory symptoms or whether any of the symptoms are affiliated with a diagnosed illness.

Id. at 8-9. The Board recommended that Mr. Tyrues undergo additional respiratory examinations on remand.

Remand proceeded in the VA Regional Office in Montgomery, Alabama. From December 1998 to October 2002 Mr. Tyrues underwent three medical examinations, all focused on his respiratory symptoms as required by the Board. The VA examiners came to three different conclusions: (1) Tyrues "probably has chronic bronchitis, which gets worse when he gets exposed to dust, paint, etc."; (2) Tyrues suffers from "mild chronic bronchitis with a history of refractory pneumonia [and] shortness of breath due to an undiagnosed illness"; and (3) Tyrues "is allergic to certain paints and vapor and these occasional respiratory symptoms are not related to the exposure of fumes in Gulf War." *Tyrues v. Shinseki*, 23 Vet. App. 166, 169-70 (2009).

In 2004 the BVA denied service connection of respiratory symptoms under § 1117. The Board acknowledged that Persian Gulf War veterans receive presumptive service connection for certain "unexplained" or "undiagnosed" chronic disabilities manifesting within the presumptive period, but concluded that Mr. Tyrues' respiratory problems were not "unexplained." The Board stated that his symptoms were

attributable to "known clinical problems" over the years, including pneumonia, pharyngitis, tonsillitis, bronchitis, and a reaction to inhaling environmental agents, *i.e.*, various etiologically known lung disorders. 2004 Bd. op. at 11. The Board did not reconcile its 2004 and 1998 determinations.

Mr. Tyrues appealed to the Court of Appeals for Veterans Claims, arguing that he met the preponderance of evidence standard for direct service connection of a lung disorder under § 1110, and alternatively that his evidence established entitlement to the statutory presumption of service connection under § 1117. He also argued that the BVA should not have "separat[ed] his claim for direct service connection for a respiratory disability from his claim for presumptive service connection for a lung disability due to an undiagnosed illness." *Tyrues v. Nicholson*, 20 Vet. App. 231, 2005 WL 3157695, at *2 (2005).

The Veterans Court affirmed the BVA's ruling under § 1117, and dismissed his theory of direct service connection under § 1110 because he did not take an interlocutory appeal of that aspect of the BVA's 1998 decision within 120 days, citing 38 U.S.C. § 7266(a). The Veterans' Court held that the 120-day appeal period had run in 1998 as to that theory, and that his appeal as to direct service connection was jurisdictionally barred. 2005 U.S. App. Vet. Claims LEXIS 750, at *3.

Mr. Tyrues appealed to this court, and we remanded, *Tyrues v. Peake*, 273 F. App'x 921, 922 (Fed.

Cir. 2008) ("*Tyrues I*"), based on the government's stipulation that it would be appropriate to remand in light of the Veterans Court's holding in *Roebuck v. Nicholson*, 20 Vet. App. 307 (2006). *Roebuck* held that when there are two theories of entitlement on a single disability claim, *i.e.*, a direct theory and a presumptive theory, the 120-day appeal period of § 7266 "will not begin to run until the Board has denied all theories in support of the claim that it has identified for consideration." 20 Vet. App. at 316.

The full seven-judge Veterans Court heard Mr. Tyrues' case on remand for consideration in light of *Roebuck*, issuing four opinions. *Tyrues v. Shinseki*, 23 Vet. App. 166 (2009). The plurality opinion concluded that finality attached to the 1998 BVA decision on the § 1110 direct service connection aspect because *Roebuck* was either wrong or inapplicable. *Id.* at 172-76. The other three opinions criticized the plurality's failure to provide clear guidance, and expressed divergent views, from the view that Mr. Tyrues asserted two "separate and distinct claims," to the view that Mr. Tyrues asserted one claim with two theories of service connection. *Id.* at 185-199. The majority affirmed dismissal of the appeal of the § 1110 aspect of Mr. Tyrues' claim.

Mr. Tyrues again appealed to this court, and we affirmed on the ground that under the "rigid jurisdictional nature of § 7266," public policy is best served by allowing appeals once the Board makes part of a claim final. *Tyrues v. Shinseki*, 631 F.3d 1380, 1383 (Fed. Cir. 2011) ("*Tyrues II*"). This court did not

explain why a policy interest in *allowing* interlocutory appeal in partial decision cases resulted in a rule *requiring* interlocutory appeal; however, it was clear that we viewed § 7266(a) as jurisdictional. *Id.* at 1384.

Shortly after our decision in *Tyrues II*, the Supreme Court ruled that § 7266(a) is not jurisdictional. *Henderson v. Shinseki*, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011). The Court stated that § 7266(a) is a "claim processing rule" enacted to assist with the "orderly progress of litigation" in veterans cases, and should not be construed to produce harsh and unfair consequences to veterans. *Id.* at 1203-04. The Court identified the availability of equitable tolling as one of the distinctions between a claim processing rule and a jurisdictional rule. *Id.* at 1205.

With this guidance, Mr. Tyrues petitioned the Supreme Court for review of our decision in *Tyrues II*. *See* Pet'n for Certiorari, 2011 WL 1853076 (May 12, 2011). The question Tyrues posed to the Court did not concern equitable tolling. Rather, Tyrues asked whether a partial decision of the BVA *must* be immediately appealed "when all theories of entitlement to the benefit sought have not been resolved." *Id.*, at *10. The petition stated that:

> [O]ften there are multiple theories or legal bases to establish entitlement to compensation under what has been described as a confusing tapestry of laws and regulations. . . . There is no reason for veterans to be required to appeal a final Board decision when

> an alternative theory of entitlement has not been finally adjudicated by the VA. Whether a veteran is awarded under one theory of entitlement or another, the veteran's amount of compensation is not affected. It is the degree of disability that dictates the amount of compensation the United States pays for a resulting disability. Thus, the policy consideration should be on the process of determining entitlement and not on compelling appeals which could be mooted by an award under another theory.

Id. Despite Tyrues not mentioning equitable tolling, the Court granted Tyrues' petition, vacated *Tyrues II*, and remanded "for further consideration in light of Henderson." *Tyrues v. Shinseki*, 132 S. Ct. 75, 181 L. Ed. 2d 2 (2011). The Federal Circuit in turn remanded to the Veterans Court, stating that:

> Because the Veterans Court erroneously treated the appeal deadline as jurisdictional, we vacate the Veterans Court's judgment and remand for further proceedings to determine whether the non-jurisdictional nature of the 120 – day deadline should lead to a different result.

467 F. App'x 889, 890 (Fed. Cir. 2012).

On remand, Tyrues argued that the BVA incorrectly split his "singular claim" for service-connected lung disorder into two claims based on different theories of entitlement. He argued that claim splitting for purposes of immediate appeal was unfair and

prejudicial to veterans when the remanded portion of the claim is closely related to the decided portion of the claim.

The plurality of the Veterans Court rejected Tyrues' argument, on the basis that regardless of *Henderson*, "a veteran's claims may be treated as separable on appeal." 26 Vet. App. 31, 34 (citing *Elkins v. Gober*, 229 F.3d 1369, 1373-76 (Fed. Cir. 2000)). Dissenting judges disputed that Tyrues presented more than one separable claim, and stated that *Henderson* compels revisiting "the veteran-unfriendly presumption that this [case] provides adequate notice to unrepresented claimants that they must immediately appeal a bifurcated decision or lose their appellate rights."[1] *Id.* at 35.

Today my colleagues agree with the Veterans Court plurality that appeal of a bifurcated theory of service connection is forfeited if not appealed separately, within 120 days of the partial decision. This court holds that a veteran cannot await final adjudication of all aspects or theories of his claim before appealing the portion of a decision of the BVA resolving part of the claim. The court does not address Tyrues' principal argument: that he presented a "singular claim," inseparable from the remanded

[1] Prior to 2006, Veterans were substantially restricted from obtaining legal representation at the BVA stage, adding to the inequity of charging the veteran with knowledge of this illogical and prejudicial requirement.

issues and evidence. Instead, the court ratifies the unworkable requirement that interlocutory appeal is mandatory when a partial BVA decision is "sufficiently separate from the remand portion." Maj. op. at 8.

Today's decision provides no usable guidance or analysis as to when a BVA ruling is "sufficiently separate" to invoke the adopted rule. Here, Mr. Tyrues has consistently stated that his § 1110 and § 1117 theories are based on the same medical evidence pertaining to the same disability, and constitute a single claim of inextricably intertwined issues and related arguments. This relationship has not been refuted, or even discussed.

The court does not account for the Supreme Court's guidance in *Henderson*, that § 7266(a) is intended to "promote the orderly progress of litigation" – not unfairly to remove unrepresented veterans from access to judicial review when they have diligently pursued the remand that could moot any need for appeal. The court's ruling today contravenes the principles of *Henderson*. No reason or benefit has been offered to justify this harsh departure from the final judgment rule in rulings of the BVA.

The final judgment rule and interlocutory appeal

Compulsory interlocutory appeal is contrary to the federal rules, and its inflexible adoption is particularly inapt in veterans' cases, where partial remand from the BVA to the Regional Office is frequent. Under the final judgment rule, interlocutory appeals

may be available in certain specified circumstances, but such appeals are generally not available absent certification by the court that there is "no just reason for delay," a determination that was not made here.

My colleagues state, citing *Elkins v. Gober*, that this court has "long held that a decision definitively denying certain benefits . . . is a 'final' decision under section 7266(a)." Maj. op. at 7. Both the Secretary and Mr. Tyrues disagree with this characterization of *Elkins*. Mr. Tyrues correctly states that *Elkins* "allow[s]" a veteran to take immediate appeal from a partial decision of the Board when fairness requires, but does not *require* such appeal if the veteran diligently pursues remand first. Tyrues Br. 17. The Secretary correctly states that this court "did not address in *Elkins* the issue raised on appeal by Mr. Tyrues" of whether interlocutory appeal of a partial BVA decision should be discretionary rather than mandatory. Gov't Br. 22 n.6.

Mr. Tyrues and the Secretary are correct. In *Elkins* this court considered the question of whether the Veterans Court must always dispose of all claims or issues presented to it, before the Federal Circuit may exercise appellate jurisdiction under 38 U.S.C. § 7292. 229 F.3d at 1373. We concluded that final decision of all claims or issues is not a requirement for our review under § 7292, for "a litigant's individual claims for relief may, in certain circumstances, be separable for purposes of appellate review." *Id.* We explained that various claims of a veteran's overall case "may" be treated as distinct for jurisdictional

purposes when "it would be unfair to deny the veteran an immediate appeal of a final decision as to one or more of his claims simply because an additional claim is remanded for further proceedings." *Id.* at 1376.

Elkins is firmly rooted in administrative precedent, such as *Dewey Electronics Corp. v. United States*, 803 F.2d 650, 656 (Fed. Cir. 1986). In Dewey the court held that a rule requiring the full and complete decision of the Armed Services Board of Contract Appeals (ASBCA) before permitting appeal would be inconsistent with "the efficiency and flexibility generally associated with administrative proceedings." The *Elkins* court held that *Dewey* "applies with even greater force to veterans cases." 229 F.3d at 1376.

In *Dewey* the court stated that interlocutory appeal is permitted, but it did not answer the question here, of whether interlocutory appeal is mandatory. That question was raised and answered in *Brownlee v. DynCorp.*, 349 F.3d 1343 (Fed. Cir. 2003). In *Brownlee* we held that the fact that a party could have appealed a particular decision at an interlocutory stage, did not prohibit the party from raising the issue on appeal of the Board's final decision. *Id.* at 1347 ("Allowing the aggrieved party to wait for a truly final judgment before appealing furthers the purposes of . . . the doctrine of finality."). The court cited numerous authorities including Supreme Court and Circuit Court authority. *See Brownlee*, 349 F.3d at 1348 (citing *e.g.*, *Cox Broadcasting Corp. v. Cohn*,

420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) and *Victor Talking Machine Co. v. George*, 105 F.2d 697 (3d Cir. 1939)).

Precedent is clear that interlocutory appeal in specified situations "although permitted, is not obligatory." *Ernst v. Child and Youth Services of Chester County*, 108 F.3d 486, 493 (3rd Cir. 1997) ("an interlocutory appeal from a denial of summary judgment on immunity grounds, although permitted, is not obligatory"); *Tincher v. Piasecki*, 520 F.2d 851, 854 (7th Cir. 1975) ("Although the preliminary injunction was appealable as of right . . . the defendants' failure to appeal did not waive their right to appeal from the final order. An interlocutory appeal is permissive rather than mandatory"); *Scarrella v. Midwest Fed. Sav. & Loan*, 536 F.2d 1207, 1209 (8th Cir. 1976) ("A party is not required to take an interlocutory appeal authorized by statute."); *Bingham Pump Co. v. Edwards*, 118 F.2d 338, 339 (9th Cir. 1941) ("appellant was not required to [immediately] appeal from the interlocutory decree" holding patent valid and infringed); *see generally* 16 Charles A. Wright et. al., Fed. Prac. & Proc. Juris. § 3921 n.27 (2d ed.).

In discussing this pragmatic procedure, the Third Circuit explained that:

> A party, feeling himself aggrieved by an interlocutory decree of the kind mentioned, is given the right to appeal without awaiting a final decree, upon condition that he take his appeal within thirty days. [Section 1292], however, does not require an aggrieved party

> to take such an appeal in order to protect his rights, and, where it is not taken, does not impair or abridge in any way the previously existing right upon appeal from the final decree to challenge the validity of the prior interlocutory decree. The aggrieved party may, therefore, await the final determination of the case and upon appeal therefrom raise all questions involved in the case.

Victor Talking Machine, 105 F.2d at 699. As discussed in *Elkins*, this reasoning applies with even greater force in the context of veterans' adjudication. *Elkins*, 229 F.3d at 1376; *see Henderson*, 131 S. Ct. at 1206.

Elkins did not hold that any aspect decided by the BVA, among multiple claims or issues, *must* be immediately appealed to the court although other aspects were remanded to the Regional Office. We observed rather that veterans are entitled to the "flexibility generally associated with administrative proceedings" as opposed to the rules of appeal from district courts where multiple claims "must be tried together and appealed all at once" except in the specific circumstances of Rule 54(b). *Elkins*, 229 F.3d at 1375. These principles appeared in the administrative context in *Brownlee*.

The majority rejects the applicability of *Brownlee* in the veterans context, on the basis that the appeal statute in ASBCA cases states that a contractor "may" appeal an adverse decision within 120 days, whereas the veterans' appeal statute § 7266(a) states that the veteran "shall" appeal "a final decision" of

the Board within 120 days. Maj. op. at 11. The distinction the majority draws is not in alignment with general federal practice, *see Brownlee*, 349 F.3d at 1348 nn.2, 3. Mandatory interlocutory appeal is not required in any statute or rule. The Supreme Court permits discretionary interlocutory appeal under 28 U.S.C. § 1257 despite the requirement that review "shall" be applied for within ninety days after final judgment. *See id.* at 1348 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) *and* 28 U.S.C. § 2101(c)). And the Circuit Courts of Appeal generally permit discretionary interlocutory appeal under 28 U.S.C. § 1292 despite the requirement that appeal "must" be filed within 30 days of entry of the judgment or order appealed from. *See* 349 F.3d at 1348 (citing *Victor Talking Machine*, 105 F.2d at 697) *and* Fed. R. App. P. 4(a)(1)(A).

The majority also proposes to distinguish *Brownlee* on the theory that it "did not involve . . . a completed adjudication of a particular claim for relief, but only separation of liability and quantification determinations." Maj. op. at 12. However, neither did Mr. Tyrues receive a completed adjudication of his claim, for he received only a partial decision based on *one theory* of relief under § 1110, while his other theory of relief under § 1117 was remanded for development on related or identical evidence involving the same respiratory illness.

The rule set forth today simply requires satellite litigation of "sufficiently separable" issues, with no discernible guidance or benefit.

Veteran Tyrues presents only one claim for service connection

The majority does not explain what constitutes a "sufficiently separate" decision to warrant mandatory interlocutory appeal, while it is clear that one aspect of the same claim should not require immediate separate appeal. This was the subject of this court's remand for consideration in light of *Roebuck*. In *Roebuck*, the Veterans Court held that

> **3. Requirements of a Notice of Appeal when the Board Bifurcates a Claim**
>
> Pursuant to 38 U.S.C. § 7266, an appeal to this Court is commenced by the filing of a Notice of Appeal within 120 days of a final Board decision. We hold that when a claimant raises more than one theory in support of a claim during the time while that claim is still pending before VA, if the Board bifurcates those theories or arguments and addresses them in separate decisions, the time for appeal is not ripe until the Board issues a final decision denying all theories. Under those circumstances, the 120-day requirement for filing a Notice of Appeal will not begin to run until the Board has denied all theories in support of the claim that it has identified for consideration. The final resolution of a veteran's claim may be disserved by

> requiring the veteran to immediately appeal part of the BVA's decision, although the BVA has remanded to the Regional Office for proceedings on the same claim.

20 Vet. App. at 315-16. I encourage return to this wise ruling, which is well supported by precedent that a veteran with a single disability has only one claim, even if the veteran asserts more than one theory of entitlement to benefits for the disability. *See Schroeder v. West*, 212 F.3d 1265, 1270 (Fed. Cir. 2000) (veteran's claim for bilateral eye disorder on direct theory of service connection under § 1110 was "same claim" as his claim for service connection on a presumptive theory based on exposure to Agent Orange because both were based on the same disability); *Bingham v. Nicholson*, 421 F.3d 1346, 1348 (Fed. Cir. 2005) (veteran seeking service connection for an ear condition on a direct basis and later on a presumptive basis, did not have two separate claims, but had two separate "theories" of a single claim for benefits); *Roebuck*, 20 Vet. App. at 313-14 ("although there may be multiple theories or means of establishing entitlement to a benefit for a disability, if the theories all pertain to the same benefit for the same disability, they constitute the same claim."); *Clemons v. Shinseki*, 23 Vet. App. 1, 4 (2009) ("multiple medical diagnoses or diagnoses that differ from the claimed condition do not necessarily represent wholly separate claims").

The limitation to a single claim for benefits is not inconsistent with the understanding that service

connection for certain disorders can be either direct or presumptive. *Combee v. Brown*, 34 F.3d 1039, 1043 (Fed. Cir. 1994). The veteran need only demonstrate one theory of service connection to have a "well-grounded claim." *Schroeder*, 212 F.3d at 1270-71. The BVA's 1998 ruling that Mr. Tyrues had not proven direct service connection by a preponderance of evidence was not a complete and final adjudication of his claim for a service connected lung disorder, because respiratory symptoms of Persian Gulf Syndrome are the subject of a statutory presumption of service connection. His assertion of either or both direct and presumptive theories of service connection is a claim for the same disorder. *See Bingham*, 421 F.3d at 1348 (separate theories are not separate claims). A ruling as to one theory accompanied by remand to resolve a second theory is not a complete adjudication of the claim.

The majority's position that Mr. Tyrues asserted multiple claims is incorrect. Mr. Tyrues' claim for lung disorder is the same malady for both of his theories of service connection; the only difference is the nature and burden of proof. On the theory of direct service connection, he has the burden of showing service connection by a preponderance of the evidence; on the theory of presumptive service connection, he has to show entitlement to the statutory presumption. Tyrues points out that all of the medical evidence adduced on remand related to the illness of his lungs under both theories.

Rule 54(b), even if viewed as applicable to BVA appeals, was not satisfied

The majority offers analogy to Federal Rule 54(b) in support of its mandatory interlocutory appeal.[2] However, Rule 54(b) requires the tribunal to make express findings of both "finality" of adjudication of a specific issue, and "no just reason for delay" as to that issue. The BVA made no such findings. Rule 54(b), for sound reason, was not relied on by the Veterans Court or the Secretary, for the BVA did not purport to meet the requirements of the Rule.

As stated in *Abney v. United States*, 431 U.S. 651, 656-57, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977), "[t]he general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." When justice or convenience warrants, shortcuts are available, whether under Rule 54(b) or

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[2] Rule 54(b). **Judgment on Multiple Claims or Involving Multiple Parties.**

> When an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

as discussed in *Elkins*, *supra*. Although the panel majority proposes otherwise, prior to Mr. Tyrues' case the Federal Circuit has never held that a litigant must immediately appeal part of an incomplete decision, or lose the right to appeal that part after final judgment.

The relevant appeal statutes are 38 U.S.C. §§ 7266 and 7252. Section 7266(a) requires veterans to appeal "a final decision" of the BVA within 120 days, and section 7252 grants the Veterans Court jurisdiction to review any "decision" – final or not. The Veterans Court may decline to review partial decisions of the BVA if the appealed issue is "inextricably intertwined" with an undecided issue pending before the Regional Office. *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991). None of these authorities requires mandatory interlocutory appeal by the veteran of an aspect of his case while a related aspect is remanded.

Applying Rule 54(b), requirement of explicitly finding "no just reason for delay" is separate from and in addition to issue finality. "Once having found finality, the district court must go on to determine whether there is any just reason for delay." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7-10, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980). *See iLOR, LLC v. Google, Inc.*, 550 F.3d 1067, 1072 (Fed. Cir. 2008) ("it must be apparent, either from the district court's order or from the record itself, that there is a sound reason to justify departure from the general rule that

all issues decided by the district court should be resolved in a single appeal of a final judgment.").

As explained by Professor Wright, this aspect of Rule 54(b) was added because the previous version of the rule "provided no guidance on what constituted a 'final order' so that parties lacked any reliable means of determining whether a particular court order relating to less than all of the claims was appealable." 10 Fed. Prac. & Proc. Civ. § 2653 (3d ed.). This "no reason for delay" requirement is on point for veterans' cases, because it "reduces as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a [partial] judgment." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512, 70 S. Ct. 322, 94 L. Ed. 299 (1950). Application of Rule 54(b) without certification of "no just reason for delay" is improper.

The majority stresses the "finality" of the BVA's decision of Tyrues' theory of direct service connection and the BVA's "unequivocal appealability directives," maj. op. at 9. The majority states that the BVA provided "unchallenged clarity" about its intent to render a separately appealable ruling. *Id.* at 1356. But here the BVA was not unmistakably clear or unequivocal that immediate appeal of the ruling on this theory was essential, lest the theory be forfeited on final judgment. There was no analogy to the "certification" required by Rule 54(b).

The BVA sent Mr. Tyrues generic instructions headed "Notice of Appellate Rights" and "Your Rights

to Appeal our Decision." The instructions were not specific to Mr. Tyrues' case. The instructions stated that a decision granting "less than the complete benefit . . . is *appealable* to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision;" that is, that the Veteran has the *right* to appeal if he receives less than was requested. 1998 Bd. op. at 11 (emphasis added). The instructions stated that the veteran could not appeal a remand because a remand is "in the nature of a preliminary order" and "is not a final decision." *Id.* at 12-13.

Although the instructions stated that issues addressed in the BVA's "Order" section are "final," that statement was not unmistakably clear in requiring a mandatory immediate appeal. *See Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1221 (5th Cir. 1990) (district court must express the intent to enter a partial final judgment with "unmistakable clarity"). In Mr. Tyrues' case the issue the BVA decided was on the same respiratory disorder that was remanded. The Board simultaneously stated that there was no competent evidence of a lung disorder, and that "[a]s the record stands, it is unclear whether there is medical evidence to support the veteran's claimed respiratory symptoms." 1998 Bd. op. at 7, 9. Still, the majority rules that from these instructions veteran Tyrues would know and should have known that he must immediately appeal the denial of direct service connection, although the Board's rulings were confusing at best, if not directly inconsistent.

The Veterans Court certainly did not deem Mr. Tyrues' case one of clear and unequivocal finality by the BVA. *See* 23 Vet. App. 166 (2009) (four opinions from seven judges); 26 Vet. App. 31, 33 (2012) (three opinions from six judges). All of the Veterans Court judges recognized in their separate opinions that cases such as *Roebuck, Maggitt*, and *Elkins* call into question the government's interpretation of the Board's instructions to the veteran. *E.g.*, 23 Vet. App. at 174. The Secretary does not have plenary power or statutory authority to determine the appeal requirement for veterans. This departure from standard appellate practice in a manner hostile to veterans' entitlement to judicial review requires strict scrutiny, not deferential acceptance.

None of the Veterans Court opinions found "clarity" in the BVA's instructions concerning appeal. All of the judges recognized the complexities involved. *See* 23 Vet. App. at 179-80 (plurality based on "the totality of the circumstances"); *id.* at 185-86 (concurring opinion on ground that "what constitutes a 'claim' differs depending on what stage in the administrative process one is attempting to define a claim."); *id.* at 187-88 (opinion criticizing plurality for interchangeable use of "issue," "matter," and "claim" without clear definition of those terms); *id.* at 193-94 (dissenting opinion that "a Board decision does not become final until it is ripe for judicial review, regardless of the Board's desire to wash its hands of a particular theory before the claim has been fully developed and

adjudicated"). As explained in a separate opinion on remand:

> This case is not about a "mixed decision," where the Board denies one claim while remanding another. This case is about the finality of a single claim that the Board bifurcates based upon different theories. . . . The hard question presented by this case is how to handle VA's practice of bifurcating a single claim and adjudicating different theories separately. That is the question to which the system needs a clear answer.

26 Vet. App. at 35-36 (citations omitted).

I repeat that precedent cannot be reconciled with today's ruling. In *Roebuck* the Veterans Court held that "the 120-day requirement for filing a Notice of Appeal will not begin to run until the Board has denied all theories in support of the claim that it has identified for consideration." 20 Vet. App. at 315-16. In *Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1365 (Fed. Cir. 2005), we explained that a remanded claim for benefits is not a "decision," let alone a final decision. In *Joyce v. Nicholson*, 443 F.3d 845, 850 (Fed. Cir. 2006), we held that review by the Federal Circuit is unavailable for a portion of a single claim when the remainder of the claim is remanded.

The court's answer today is neither clear nor correct. The court states that a BVA decision on an issue must be immediately appealed if the BVA ruling is "definitive and sufficiently separate from a remand portion," maj. op. at 8, but my colleagues provide no

guidance as to what this means. Here, the 1998 BVA decision was not "definitive" of Mr. Tyrues' respiratory claim, nor was it separate from the remand portion, which also addressed his respiratory symptoms. The appropriateness and utility of an interlocutory appeal[3] depends on the particular situation. For example, if the Regional Office had found on remand that Tyrues is entitled to the statutory presumption of service connection, that would have resolved his claim, and the now-required interlocutory appeal would be unnecessary. Tyrues explains the practical consequences:

> a favorable finding on the theory/claim for *undiagnosed* lung disorder would have a substantial impact on the *diagnosed* lung disorder theory/claim, most likely rendering it moot. . . . As for medical development of

[3] The panel majority objects to the usage "interlocutory," arguing that a partial decision of a veteran's single claim is "a final decision" and "not an interlocutory decision" although the entire claim is remanded for application of a different theory of entitlement. Maj. op. at 10. However, the standard definition of "interlocutory" is "not constituting a final resolution of the whole controversy." Black's Law Dictionary (9th ed. 2009). Even Rule 54(b), from which the majority draws support, requires final decision of an entire claim, as the Supreme Court has explained: "Rule 54(b) does not apply to a single claim action. . . . It is limited expressly to multiple claims actions in which one or more but less than all of the multiple claims have been finally decided and are found otherwise to be ready for appeal." *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976).

> the claim, one pulmonary specialist could have addressed both theories.

Tyrues Br. at 14-15 (emphases original).

Under this rule, veterans will be forced to incur the time and expense of appealing every partial decision of the BVA to preserve rights, even if such decision would be mooted by the remand aspect. The court's ruling will be of wide impact, for the BVA not infrequently remands aspects of a claim to the Regional Office while disposing of other aspects. Today's requirement of immediate partial appeal serves neither efficiency nor fairness, while adding complexity and cost and time to determination of veterans' concerns.

I take note of the majority's proposal that a mandatory immediate partial appeal is beneficial to the veteran because it "enables" the veteran to appeal. Maj. op. at 9. However, *Elkins* already provides the veteran with the right and opportunity to appeal. *See Elkins*, 229 F.3d at 1376 ("each 'particular claim for benefits' may be treated as distinct for jurisdictional purposes"). This case is about the requirement to immediately appeal an aspect of a claim, not the ability or authorization to immediately appeal such aspect.

The majority's holding that because a veteran *may* appeal from a partial BVA decision, he *must* immediately appeal, is not consistent with the policy embodied in the veterans' statutes, as reiterated by the Court in *Henderson*, 131 S. Ct. at 1206, that "We

have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."

The GVR

Today's ruling strains the Court's grant of certiorari and remand of Mr. Tyrues' appeal. My colleagues set the GVR aside, seeing "no basis for now reaching a different conclusion" from the prior decision, because Mr. Tyrues did not request the remedy of "equitable tolling." Maj. op. at 6, 11. However, *Henderson* is not limited to equitable tolling. The Court's GVR of Mr. Tyrues' appeal is not reasonably construed as strictly limited to an argument that was not even included in the Tyrues cert. petition. The GVR requires our consideration of how *Henderson* relates to the reasoning of *Tyrues II*. *See United States v. Holloway*, 630 F.3d 252, 258 (1st Cir. 2011) ("A Supreme Court opinion need not be directly on point to undermine one of our opinions."). Our prior reasoning that Mr. Tyrues' appeal of his argument for direct service connection was time barred because "Section 7266(a) is mandatory and jurisdictional," 631 F.3d at 1383, is negated by *Henderson*.

Mr. Tyrues' petition for certiorari raised the question of whether he should be required to immediately appeal a partial BVA decision on one of his two theories of service connection for the same disability. The Federal Circuit decision from which he petitioned had inflexibly applied the 120-day appeal period to

require interlocutory appeal of a partial ruling on Mr. Tyrues' claim. The court today again imposes the 120-day time limit for the direct service connection aspect, and holds that Mr. Tyrues forfeited appeal of this aspect, although another theory of service connection for the same disability was remanded for development by the Regional Office. The consequences are as unfair as they are inefficient, warranting at least this court's discussion of its rejection of the equitable principles of *Henderson*.

This court compounds the inequity, for even as my colleagues rule that veterans must pursue the partial appeal or forfeit the issue, "the Veterans Court may decline to review the [partial] decision." Maj. op. at 8-9 (citing *Harris*, 1 Vet. App. at 183). Thus my colleagues hold that although the veteran must incur the costs and fees and delay of briefing and argument of an interlocutory appeal, the veteran may later learn that the interlocutory appeal is deemed inappropriate by the court and will not be decided.

The premises of this GVR warrant a less severe view of procedures in veteran cases. At least, the veteran should receive as much consideration as does the government. For example, in *Bingham* the government took the opposite position from that which it argues here, arguing that direct and presumptive service connection "are two theories by which service connection can be proven . . . not two separate claims upon which an effective date must be based." *Bingham*, Gov't Br., 2005 WL 1250863, at *9. The Federal

Circuit adopted that view, 421 F.3d at 1348, in conflict with today's ruling.

Today's ruling contravenes the Court's advice to apply § 7266(a) as neither mandatory nor jurisdictional, and to assure orderly litigation procedures, avoiding harsh or unfair consequences to veterans. *Henderson*, 131 S. Ct. at 1204. From my colleague's ruling that the veteran must take an interlocutory appeal or forfeit appeal of that aspect, I respectfully dissent.

Larry G. Tyrues, Appellant, v. Eric K. Shinseki, Secretary of Veterans Affairs, Appellee.

NO. 04-584

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

26 Vet. App. 31;
2012 U.S. App. Vet. Claims LEXIS 1881

August 23, 2012, Decided

COUNSEL: For Larry G Tyrues, Appellant: Mark R. Lippman, Esq., Attorney, The Veterans Law Group, La Jolla, CA; Kenneth M. Carpenter, Esq., Attorney, Carpenter Chartered, Topeka, KS.

For Eric K. Shinseki, Secretary of Veterans Affairs, Appellee: Nisha C. Hall, Esq., Attorney, Department of Veterans Affairs (OGC)(027F), Washington, DC.

JUDGES: Before KASOLD, Chief Judge, and HAGEL, MOORMAN, LANCE, DAVIS, and SCHOELEN, Judges.[1]

OPINION

[1] Judges Pietsch and Bartley did not participate in this decision because a full-Court conference was held in this matter subsequent to the April 12, 2012, remand from the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) and prior to their appointment. See Court's Internal Operating Procedures VII(b)(3) (En Banc Review Granted).

ORDER

In an en banc decision dated October 2, 2009, the Court (1) vacated an April 7, 2004, decision of the Board of Veterans' Appeals (Board) denying Larry G. Tyrues entitlement to service connection on a *presumptive* basis under 38 U.S.C. § 1117 for a respiratory or lung condition resulting from an undiagnosed illness incurred in military service in the Persian Gulf and remanded that matter for further proceedings; and (2) dismissed, for lack of jurisdiction, the appeal from a September 29, 1998, Board decision denying Mr. Tyrues service connection for a lung disorder on a *direct* basis under 38 U.S.C. § 1110.[2] *Tyrues v. Shinseki*, 23 Vet.App. 166, 179-85 (2009) (en banc). The Court concluded that "a final Board decision denying VA disability compensation based upon direct service connection, while the consideration of benefits based upon presumptive service connection is still under adjudication, constitutes a final decision subject to separate appeal to the Court." *Id.* at 176 (discussing *Elkins v. Gober*, 229 F.3d 1369, 1373-76 (Fed. Cir. 2000)). Specifically, as to the 1998 Board decision, the Court held that the decision was "final concerning the issue of section 1110 compensation for direct service connection for a lung disability" and that, "[b]ecause the appellant did not file a [Notice of

[2] The 1998 Board decision also had remanded to a VA regional office, for further development, the matter of service connection on the presumptive basis that, 5 years later, resulted in the April 2004 Board decision now on appeal.

Appeal (NOA)] within 120 days after VA mailed notice of the Board's final September 1998 decision, the Court lacks jurisdiction to review the September 1998 Board decision." *Id.* at 181 (citing 38 U.S.C. § 7266(a)). Mr. Tyrues appealed that decision to the Federal Circuit.

On February 11, 2011, the Federal Circuit affirmed this Court's holding that "the September 1998 Board decision was properly dismissed for lack of jurisdiction." *Tyrues v. Shinseki*, 631 F.3d 1380 (Fed. Cir. 2011). The Federal Circuit agreed that the "non-remanded portion" of the 1998 Board decision was a final decision for the purpose of 38 U.S.C. § 7266(a) and held: "In light of § 7266's plain language, the policy considerations, and this court's precedent[,] all final decisions, even those appearing as part of a mixed decision [(i.e., a decision containing remanded and nonremanded portions)], must be appealed within 120 days from the date of mailing of notice of the decision." *Id.* at 1385. Mr. Tyrues filed a petition for writ of certiorari, which the U.S. Supreme Court granted, and the Supreme Court vacated the judgment of the Federal Circuit and remanded the case to the Federal Circuit for further consideration in light of *Henderson v. Shinseki*, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011) (*Henderson III*), which held that the 120-day deadline for filing an appeal with this Court – although an important procedural rule – does not have jurisdictional consequences. *Tyrues v. Shinseki*, 132 S. Ct. 75, 181 L. Ed. 2d 2 (2011).

In an April 12, 2012, order, the Federal Circuit, in turn, vacated this Court's judgment and remanded the case "for further proceedings to determine whether the non-jurisdictional nature of the 120-day deadline should lead to a different result." *Tyrues v. Shinseki*, No. 2010-7011, 467 F. App'x 889, 2012 WL 1389702 (Fed. Cir. Apr. 12, 2012). The Federal Circuit issued mandate on June 4, 2012.

After reviewing the Court's October 2, 2009, decision, the Court has determined that the non-jurisdictional nature of the 120-day deadline does not lead to a different result. The result reached by the Court was that the 1998 Board decision was a final decision on the matter of entitlement to service connection for a lung disorder on a direct basis under section 1110; and dismissal of that part of the appellant's April 2004 appeal as to the 1998 Board decision was appropriate because Mr. Tyrues failed to file an NOA within 120 days after the 1998 Board decision was mailed, as required under 38 U.S.C. § 7266(a). *Tyrues*, 23 Vet.App. at 180-82.

Although the 120-day deadline is no longer jurisdictional, it is an "important procedural rule," *Henderson III*, 131 S. Ct. at 1206, and is subject to equitable tolling within the parameters established by the Federal Circuit and this Court prior to *Henderson v. Peake*, 22 Vet.App. 217 (2008) (*Henderson I*) (holding that equitable tolling was not for application under any circumstances), *aff'd sub nom. Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc) (*Henderson II*), *rev'd*, 131 S. Ct. 1197, 179 L. Ed. 2d

159 (2011). *Bove v. Shinseki*, 25 Vet.App. 136 (2011) (per curiam order) (citing cases).

A review of the docket in this case reveals that Mr. Tyrues filed his appeal in April 2004, prior to *Henderson I*, which held in 2008 that equitable tolling of the 120-day filing period was not permitted. At the time he filed his briefs with this Court, however, in November 2004 and February 2005, the 120-day period was subject to equitable tolling, yet he presented no argument that the time to file an appeal from the 1998 Board decision should be equitably tolled. Similarly, although Mr. Tyrues was given an opportunity to brief the impact of *Henderson III* prior to the Federal Circuit's recent decision remanding this matter to this Court, *see Tyrues v. Shinseki*, 2010-7011 (Fed. Cir. Mar. 22, 2012) (order), he did not argue that the time to file should be equitably tolled.[3] Rather, throughout this litigation, Mr. Tyrues has only pursued the argument that VA "incorrectly split [his] singular claim for service-connected lung disorder into two claims based upon differing theories of etiology." Appellant's Brief at 9.

As discussed in the Court's October 2009 decision, the Federal Circuit in *Elkins* held that,

[3] The Court takes judicial notice of the parties' pleadings filed in this case at the Federal Circuit. *See Cotant v. Principi*, 17 Vet.App. 116, 125 (2003) (taking judicial notice of pleadings, including the parties' arguments regarding legislative and regulatory history, that had been filed in another case pending before the Court).

"[b]ecause . . . each 'particular claim for benefits' may be treated as distinct for jurisdictional purposes, a veteran's claims may be treated as separable on appeal." 229 F.3d at 1376. Further, "the unique statutory process of adjudication through which veterans seek benefits may necessarily require that the different issues or claims of a case be resolved at different times, both by the agency of original jurisdiction and on appeal." *Id.* at 1375. In recently quoting this conclusion, the Federal Circuit in *Sturdivant v. Shinseki*, No. 2011-7001, 2012 WL 1720380 (Fed. Cir. May 16, 2012) (nonprecedential opinion), explained: "This flexible system benefits veterans by permitting adjudication of issues as they become ripe while allowing the VA time to appropriately develop other issues or claims." 2012 U.S. App. LEXIS 9824, [WL] at *3.

Accordingly, because the appellant (1) did not file an NOA within 120 days after VA mailed the Board's September 1998 decision, (2) filed no asserted appeal for more than 5 years thereafter, and (3) did not assert that the time to file his appeal should be equitably tolled, the Court reaffirms its 2009 decision that any appeal from the September 1988 Board decision was required to have been filed within the 120-day period. *See* 38 U.S.C. § 7266(a); Elkins, supra.

Upon consideration of the foregoing, it is

ORDERED that this Court's October 2, 2009, decision dismissing the appeal as to the September

29, 1998, Board decision is MODIFIED, as discussed above, to reflect that (1) the 120-day deadline is nonjurisdictional but nevertheless an important procedural rule subject to equitable tolling, not argued or warranted in this case; (2) the nonjurisdictional nature of the 120-day rule does not alter the Court's holding that the 1998 Board decision was final on the matter of entitlement to service connection for a lung disorder on a direct basis under 38 U.S.C. § 1110; and (3) dismissal of the April 2004 appeal as to the 1998 Board decision was appropriate. Judgment on the Court's October 2, 2009, decision, as MODIFIED, shall enter in accordance with Rule 36 of the Court's Rules of Practice and Procedure.

DATED: August 23, 2012

PER CURIAM.

CONCUR BY: HAGEL (In Part); LANCE (In Part); SCHOELEN (In Part)

DISSENT BY: HAGEL (In Part); LANCE (In Part); SCHOELEN (In Part)

DISSENT

HAGEL, *Judge*, concurring in the result, dissenting in part: I continue to concur in the majority's ultimate conclusion that the Court cannot review the September 1998 Board decision because no Notice of Appeal was filed within 120 days of that decision. I also concur in the majority's new analysis regarding the applicability of equitable tolling. However, I again write separately to reiterate my belief, first stated in

my separate statement to the October 2009 decision, that our inability to review the September 1998 Board decision stems from the fact that a claim for benefits for a chronic lung disorder is a separate and distinct claim for VA compensation purposes from a claim for benefits for Persian Gulf Syndrome under 38 U.S.C. § 1117. I need not restate the entirety of my earlier separate statement here; suffice it to say that my position is unchanged.

LANCE, *Judge*, with whom SCHOELEN, *Judge*, joins concurring in part and dissenting in part: I continue to concur in the majority's outcome on the theory addressed in the majority opinion in *Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc) (*Tyrues I*). I also concur in the majority's new analysis regarding the applicability of equitable tolling. However, I again write separately to state that I continue to disagree, for the reasons outlined in my dissent in *Tyrues I*, with the majority's conclusion that we lack jurisdiction over the entire claim. As with my other dissenting colleague, I will not restate my prior opinion here. However, there are two points that are worth noting at this stage.

First, although there is no evidence that the appellant in this particular case could carry his burden to prove equitable tolling, the fundamental problem is still one of protecting the appellate rights of unsophisticated claimants who diligently pursue their claims. As I pointed out in my original dissent, the majority opinion is based upon the veteran-unfriendly presumption that this Court's decision

provides adequate notice to unrepresented claimants that they must immediately appeal a bifurcated decision or lose their appellate rights. 23 Vet.App. 166, 195 (2009) (Lance, J., concurring in part and dissenting in part). Thus, it is entirely possible for a claimant to diligently contest his or her claim only to discover that he or she has forfeited part of it because it is not obvious to a lay person that a Board decision must be appealed immediately when part of a claim has been remanded for further consideration. However, the solution to protecting diligent claimants is not to *sub silentio* overrule this Court's decision by applying equitable tolling in the absence of evidence. Rather, it is to simply base our decision on a realistic expectation of diligence on the part of claimants who lack attorneys to advise them. Accordingly, the Supreme Court's decision to remand this matter for further consideration in light of *Henderson v. Shinseki*, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011), highlights one of the central flaws of the majority opinion.

Second, I am compelled to note that the Federal Circuit's first decision in this case does not appear to actually address the situation presented by the facts of the case. *See Tyrues v. Shinseki*, 631 F.3d 1380 (Fed. Cir. 2011), *vacated*, 132 S. Ct. 75, 181 L. Ed. 2d 2 (2011) (mem.). The Federal Circuit framed the issue as "whether the non-remanded portion of a mixed decision from the Board is final." *Id.* at 1383. However, this case is not about a "mixed decision," where the Board denies one claim while remanding another.

This case is about the finality of a single claim that the Board bifurcates based upon different theories. Accordingly, when the Federal Circuit held that "[s]eparate claims are separately appealable. Each particular claim for benefits may be treated as distinct for jurisdictional purposes," id., it misses the mark.

It is well established that separate claims are jurisdictionally separate, *see*, *e.g.*, *Elkins v. Gober*, 229 F.3d 1369, 1376 (Fed. Cir. 2000), and that all theories of entitlement to benefits for a particular condition are part of the same claim, *see Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000); *see also Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009) (holding that the scope of a claim is generally defined by the symptoms for which a veteran is seeking compensation). Allowing separate claims addressed within one Board decision to be treated separately for purpose of appeal promotes speedy and efficient resolution of claims. Defining claims broadly to encompass all theories of entitlement is beneficial to veterans because it provides them with broad assistance and the earliest possible effective date in the frequent situation where the veteran is entitled to compensation for his condition, but the initial theory of the case is not the one that leads to benefits.

The hard question presented by this case is how to handle VA's practice of bifurcating a single claim and adjudicating different theories separately. That is the question to which the system needs a clear answer. I believe it is necessary and appropriate to point

it out at this juncture so that when this case is again reviewed by the Federal Circuit, it can provide clear guidance in announcing whatever conclusion it reaches.

It is not common for a claim to be bifurcated based upon the Gulf War illness statute and the traditional compensation statute. However, it is quite common to see a claim where the theories of direct, presumptive, or secondary service connection have been bifurcated. If the majority opinion is affirmed, the courts will eventually have to sort through the myriad of ugly procedural issues that arise under Title 38 when the statutory term "claim" does not actually mean "claim," at least some of the time. *See Tyrues I*, 23 Vet.App. at 195-96 (Lance, J., concurring in part and dissenting in part) (outlining several of the statutory interpretation problems created by the majority opinion). If the majority's opinion is rejected, then the system will need to adjust the handling of a large number of cases to conform to the new interpretation. Although the proper outcome may be debatable, no final resolution is certainly the worst possible outcome.

Nevertheless, to be clear, I have great respect for the court above and I do not relish critiquing their decision. However, I believe that there are certain circumstances in which we are obligated to raise an issue that may frustrate our ability to follow the Federal Circuit's mandate. *See*, *e.g.*, *Hayre v. Principi*, 15 Vet.App. 48, 52-54 (2001). This is one of those times.

Accordingly, for the reasons stated, I continue to stand by my prior dissent and I urge the Federal Circuit to clearly and directly address this issue of exceptional importance when this matter returns to that court.

Larry G. Tyrues, Petitioner v. Eric K. Shinseki, Secretary of Veterans Affairs.

No. 10-1405.

SUPREME COURT OF THE UNITED STATES

132 S. Ct. 75; 181 L. Ed. 2d 2; 2011 U.S. LEXIS 6980; 80 U.S.L.W. 3180

October 3, 2011, Decided

JUDGES: Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

OPINION

On petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Federal Circuit for further consideration in light of *Henderson v. Shinseki*, 562 U.S. ___, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011).

LARRY G. TYRUES, Claimant-Appellant, v. ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS, Respondent-Appellee.

2010-7011

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

631 F.3d 1380; 2011 U.S. App. LEXIS 2633

February 11, 2011, Decided

DISPOSITION: AFFIRMED.

COUNSEL: KENNETH M. CARPENTER, Carpenter Charter, of Topeka, Kansas, argued for claimant-appellant. On the brief was MARK R. LIPPMAN, The Veterans Law Group, of La Jolla, California.

MARTIN F. HOCKEY JR., Assistant Director Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent-appellee. With him on the brief were TONY WEST, Assistant Attorney General, JEANNE E. DAVIDSON, Director, and Todd M. Hughes, Deputy Director. Of counsel on the brief were MICHAEL J. TIMINSKI, Deputy Assistant General Counsel, and MARTIE S. ADELMAN, Attorney, Office of the General Counsel, United States Department of Veterans Affairs, of Washington, DC.

JUDGES: Before RADER, Chief Judge, LINN and DYK, Circuit Judges.

OPINION BY: RADER

OPINION

RADER, *Chief Judge*.

The United States Court of Appeals for Veterans Claims ("Veterans Court") dismissed Larry J. Tyrues's appeal from the Board of Veterans Appeals ("Board") for lack of jurisdiction. *Tyrues v. Shinseki*, 23 Vet. App. 166, 177 (2009). Because the Veterans Court correctly interpreted 38 U.S.C. § 7266 to require an appeal within 120 days, this court affirms.

I

Appellant, Mr. Tyrues, served on active duty in the United States Army from September 1969 to April 1971, and from September 1990 to May 1991, including service in the Persian Gulf War. Mr. Tyrues was hospitalized with tonsillitis and refractory pneumonia in March 1994.

Mr. Tyrues pursued disability compensation for the same respiratory symptoms under two different statutes. In March 1995, Mr. Tyrues filed his initial claim with the United States Department of Veterans Affairs ("VA") seeking compensation for a direct service connection lung disorder under 38 U.S.C. § 1110. In December 1996, Mr. Tyrues added a second claim seeking compensation for "Persian Gulf Syndrome," arguing a presumptive service connection theory, under 38 U.S.C. § 1117.

In September 1998 ("September 1998 mixed decision"), the Board denied the § 1110 direct service claim ("September 1998 denied claim") and remanded

the § 1117 claim for Persian Gulf Syndrome to a VA Regional Office ("1998 remanded claim").[1]

The Board then mailed Mr. Tyrues a Notice of Appellate Rights. This notice stated, in relevant part:

> NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C. § 7266 . . . a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to [the Veterans Court] *within 120 days* from the date of mailing of notice of the decision . . . The date that appears on the face of this decision constitutes the date of mailing and the copy of this decision that you have received is your notice of the action taken on your appeal by the Board of Veteran's Appeals. *Appellate rights do not attach to those issues addressed in the remand portion of the Board's decision*, because a remand is in the nature of a preliminary order and does not constitute a decision of the Board on the merits of your appeal. 38 C.F.R. § 20.1100(b) (1997).

(emphases added). Mr. Tyrues did not file a Notice of Appeal within 120 days from the date of mailing of notice of the Board's decision.

In April 2004, the Board again denied the remanded September 1998 claim ("2004 denied claim"). Mr. Tyrues thereafter appealed both the 2004 denied

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[1] A decision remanding one or more claims, while denying at least one other, is known as a "mixed decision."

claim and the September 1998 denied claim to the Veterans Court. In October 2009, the Veterans Court affirmed the 2004 denied claim but dismissed the appeal of the September 1998 denied claim for lack of jurisdiction. This court vacated the Veterans Court's October 2009 judgment to dismiss and remanded the matter for reconsideration. *Tyrues v. Peake*, 273 Fed.Appx. 921 (Fed. Cir. 2008).

An en banc Veterans Court, in a split decision, again dismissed Mr. Tyrues's September 1998 denied claim for lack of jurisdiction. The Veterans Court held that the September 1998 denied claim was "finally decided" and not appealed within 120 days from the date of mailing of the Board's decision, as required by 38 U.S.C. § 7266(a). This court has jurisdiction under 38 U.S.C. § 7292(a).

II

In appeals from the Veterans Court, this court reviews questions of law, including interpretation of statutory and constitutional provisions, without deference. 38 U.S.C. § 7292(d)(1). Absent a constitutional issue, this court may not review a challenge to the Veterans Court's factual findings or the application of law to facts. *Id.*

Under 38 U.S.C. § 7266, the Veterans Court has appellate jurisdiction:

> *In order to obtain review* by the Court of Appeals for Veterans Claims of a *final decision* of the Board of Veterans' Appeals, a person

> adversely affected by such decision *shall file* a notice of appeal with the Court *within 120 days* after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

(emphases added).

Section 7266(a) is "mandatory and jurisdictional." *Henderson v. Shinseki*, 589 F.3d 1201, 1220 (Fed. Cir. 2009) (en banc). Final decisions are not subject to equitable tolling because § 7266(a) is jurisdictional. *Id.* at 1220. Therefore, all final decisions must be appealed within the 120 days prescribed by § 7266(a).

Mr. Tyrues maintains that an appeal under § 7266(a) is discretionary, and not fully final, until all claims have been finally decided. Mr. Tyrues further asserts that denied claims from a mixed decision are only sometimes treated as final for purposes of immediate judicial review. Mr. Tyrues elaborates that appealing the "sometimes final" decisions is discretionary. The question addressed herein is whether the non-remanded portion of a mixed decision from the Board is final for the purposes of § 7622(a) and must be appealed within 120 days from the date of judgment.

Administrative proceedings can have different underlying policy objectives than district court proceedings. As a result, there is not always "a precise congruence between the classical jurisdictional requirements applied to appeals from district courts and the jurisdictional standards applicable to review

of administrative proceedings. . . ." *Dewey Elecs. Corp. v. United States*, 803 F.3d 650, 654 (Fed. Cir. 1986) (holding that non-remanded portions of a mixed decision from the Armed Services Board of Contract Appeals were final for the purposes of appeal to this court under 28 U.S.C. § 1295(a)(10)); *see also Elkins v. Gober*, 229 F.3d 1369, 1376 (Fed. Cir. 2000) ("Our methodology in *Dewey* for contract cases applies with even greater force to veterans cases." (citations omitted)). As such, the Board's jurisdiction does not mirror jurisdiction in district courts.

A decision from the Board is "sufficiently final" when "the process of the administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.'" *Elkins*, 229 F.3d at 1373 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S. Ct. 203, 27 L. Ed. 2d 203 (1970)). Separate claims are separately appealable. Each particular claim for benefits may be treated as distinct for jurisdictional purposes. *Id.* at 1376. This approach is "consistent with the approach adopted by the Veterans Court in treating a veteran's different claims as separately appealable matters." *Id.* at 1375 (citations omitted).

Mr. Tyrues interprets *Elkins* as espousing a conditional allowance for veterans who wish to appeal before all claims become final decisions. This court concluded that "we may treat [the veteran's]

individual claims as separable on appeal." *Id.* at 1373, 1376. Mr. Tyrues insists that usage of "may" in *Elkins* suggests a discretionary element.

The court's usage of "may" in *Elkins* does not mean appeals are discretionary. Instead, this court explained that some claims from a mixed decision may be appealable, while others are not. In *Elkins*, this court explained two important tenets: (1) that the nature of administrative proceedings creates differences between how traditional jurisdictional rules should be applied – i.e., the final judgment rule does not apply; and (2) that a "final" administrative adjudication is determined when "administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." 229 F.3d at 1374. Summarizing these two tenets, the *Elkins* court explains "that a litigant's individual claims for relief *may, in certain circumstances*, be separable for purpose of appellate review." *Id.* (emphasis added). The circumstance when a litigant's individual claims for relief *may not* be appealed is when they are "intertwined with [the remanded claims]." *Id.* at 1376.

Without an exception to § 7266's 120-day requirement, the Veterans Court's opinion explains the practical implications of intertwined claims. The court explained that "the Court has jurisdiction over [non-remanded portions of mixed decisions] on direct appeal, but may decline to exercise its jurisdiction in

such cases, as we frequently do. (citations omitted)." *Tyrues*, 23 Vet. App. at 177.

The Veterans Court's opinion in this case is not binding on this court, but the Veterans Court's opinions "are instructive of the manner in which a veteran's separate claims may be appealed sequentially." *Elkins*, 229 F.3d at 1375. This court encourages the Veterans Court to exercise its jurisdiction as needed to promote judicial efficiency and fairness when handling mixed decisions. This exercise of jurisdiction makes the most sense in light of the policy concerns underlying veterans claims.

Public policy supports allowing veterans to appeal denied claims as quickly as possible. *Id.* One particularly important policy consideration is advancing "the goal of timely providing benefits to disabled veterans." *Id.* Given the rigid jurisdictional nature of § 7266, this paramount goal is best achieved by allowing appeals once the Board makes an individual claim final. Mr. Tyrues argues this court's precedent in *Brownlee v. DynCorp*, 349 F.3d 1343 (Fed. Cir. 2003), supports allowing but not requiring appeal once a Board decision makes an individual claim final.

Brownlee holds that appeals to this court from the Armed Services Board of Contract Appeals are discretionary when there is a mixed decision. 349 F.3d at 1347 ("Allowing the aggrieved party to wait . . . furthers the purposes of both the Contract Disputes Act of 1978 . . . and the doctrine of finality.").

The present case is legally different from *Brownlee* in two important ways. First, this case is before the Board of Veterans Appeals, not the Board of Contract Appeals. The two boards pursue different policy objectives and adjudicate different types of cases. Veterans appeals, unlike contract appeals, do not adjudicate entitlement separate from issues of quantum. Second, and more importantly, § 7266 contains meaningfully different language from the statute interpreted by the *Brownlee* court.

Brownlee's holding was premised on the statutory language of 28 U.S.C. § 1295(a)(10), the jurisdictional provision for this court to hear appeals from the Board of Contract Appeals. The court observed that § 1295(a)(10) "does not address the consequences of a failure to appeal from the 'final' judgment." *Brownlee*, 349 F.3d at 1347-48. In contrast, § 7266 plainly forewarns that:

> [I]n order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such a decision shall file a notice of appeal with the Court within 120 days after the date on which the notice of the decision is mailed[.]

In light of § 7266's plain language, the policy considerations, and this court's precedent; all final decisions, even those appearing as part of a mixed decision, must be appealed within 120 days from the date of mailing of notice of the decision.

III

Accordingly, this court affirms the Veterans Court's holding that the September 1998 denied claim was properly dismissed for lack of jurisdiction.

AFFIRMED

Tyrues v. Shinseki

NO. 04-0584

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

23 Vet. App. 166;
2009 U.S. App. Vet. Claims LEXIS 1742

September 9, 2009, Argued
October 2, 2009, Decided

COUNSEL: Kenneth M. Carpenter of Lawrence, Kansas, with whom Mark R. Lippman of La Jolla, California, was on the brief for the appellant.

Nisha C. Wagle, with whom Paul J. Hutter, Acting General Counsel; R. Randall Campbell, Assistant General Counsel; and Joan E. Moriarty, Deputy Assistant General Counsel, all of Washington, D.C., were on the brief for the appellee.

JUDGES: Before GREENE, Chief Judge, and KASOLD, HAGEL, MOORMAN, LANCE, DAVIS, and SCHOELEN, Judges. MOORMAN, Judge, filed the opinion of the Court. KASOLD, Judge, filed a separate concurring opinion. HAGEL, Judge, filed a separate opinion concurring in the result and dissenting in part. LANCE, Judge, filed a separate opinion concurring in part and dissenting in part, in which SCHOELEN, Judge, joined.

OPINION BY: MOORMAN

OPINION

MOORMAN, *Judge:* The appellant, Larry G. Tyrues, through counsel, seeks review of an April 7, 2004, Board of Veterans' Appeals (Board) decision that denied disability compensation for a lung disorder as a chronic disability because the evidence did not support a finding that it resulted from an undiagnosed illness and therefore did not warrant service connection on a presumptive basis under 38 U.S.C. § 1117. Both parties filed briefs, and the appellant filed a reply brief. On November 15, 2005, the Court affirmed the Board's decision and held that it did not have jurisdiction to review a September 1998 Board decision that denied the appellant disability compensation on a direct basis. *Tyrues v. Nicholson*, 20 Vet.App. 231 (table), 2005 WL 3157695 (2005). On March 11, 2008, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) vacated this Court's decision and remanded the matter for the Court to reconsider its decision in light of two decisions reached after the Court issued its November 2005 decision in this case: *Joyce v. Nicholson*, 443 F.3d 845 (Fed. Cir. 2006), and *Roebuck v. Nicholson*, 20 Vet.App. 307 (2006). *Tyrues v. Peake*, 273 Fed. Appx. 921, 2008 WL 907458 (Fed. Cir. 2008). A panel of the Court heard oral argument on September 9, 2008. Thereafter, this case was called before the full Court. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a).

For the reasons set forth below, the Court holds that the Secretary permissibly processed and issued a final decision denying benefits based on direct service

connection, and remanded for the consideration of benefits based upon presumptive service connection, in separate decisions, in 1998 and 2004. We further hold that because benefits based on direct service connection were finally decided in a 1998 Board decision that was not timely appealed, nor reopened and considered in the 2004 Board decision, we lack jurisdiction to now review the denial of benefits for service connection on a direct basis. As discussed more fully below, the Court will dismiss, for lack of jurisdiction, that part of the appeal finally decided in the September 1998 Board decision, and we will vacate the 2004 decision of the Board now on appeal and remand the matters addressed therein for further adjudication consistent with this opinion.

I. FACTS

Mr. Tyrues served on active duty in the U.S. Army from September 1969 to April 1971, and from September 1990 to May 1991. Record (R.) at 16-17. He served in the Persian Gulf from November 1990 to April 1991. R. at 17. In March 1994, Mr. Tyrues was hospitalized for treatment of refractory pneumonia and tonsilitis. R. at 227. In March 1995, he sought VA benefits for a lung disability on the basis of direct service connection. R. at 112. In December 1996, following a VA hearing officer's suggestion that his lung symptoms and various other complaints, including sore and aching joints, may warrant a claim for "Persian Gulf Syndrome," Mr. Tyrues sought service connection on that basis as well. R. at 146-47, 150.

In a March 1997 decision, the Board remanded the matter of Mr. Tyrues's entitlement to service connection for a lung disorder for further development, including the procurement of medical records and a VA medical examination to obtain a current diagnosis of his claimed respiratory disability and to assist in a determination as to whether any current lung disorder was related to his periods of active service. R. at 155. The Board directed that following development, the VA regional office (RO), if it issued an adverse decision, should provide Mr. Tyrues with a Supplemental Statement of the Case (SSOC) and return the case to the Board. R. at 156. The following month, the RO notified Mr. Tyrues that it had received his claim for benefits based on his Persian Gulf War service and requested further evidence. R. at 163-65. An April 1997 RO Compensation and Pension Examination Worksheet noted that the Board had remanded an appeal from Mr. Tyrues and directed compliance with the Board remand as to Mr. Tyrues's claim for service connection "for a lung disorder due to Persian Gulf War service." R. at 168. The RO also noted that Mr. Tyrues "has amended his claim to include s/c [(service connection)] for aching joint, memory loss, [and] a stomach condition." R. at 168.

A May 1997 VA medical examination report identified the then-present complaints of Mr. Tyrues to be lung disorder, joint pain, and memory loss. R. at 190. The VA examiner diagnosed Mr. Tyrues as having "1. Possible Persian Gulf Syndrome with shortness of breath, joint pain, and memory loss. 2.

Degenerative arthritis feet with bilateral Hallux valgus deformity." R. at 191. The examiner opined that "[i]t is only speculation on my part, but, he did not have a lung disorder prior to his service in the Persian Gulf as he does now." *Id.*

On April 20, 1998, the RO issued a decision denying service connection for a lung disorder, which the RO noted was a "remanded issue." R. at 242. In its discussion of the lung disorder, the RO specifically stated that "service connection for a lung disorder on a direct basis remains denied" and that, in addition, "service connection for lung problems, diagnosed on VA examination as shortness of breath, as due to an undiagnosed illness is denied." R. at 243. The RO also denied service connection for three other separately identified conditions – joint pain as due to an undiagnosed illness, memory loss as due to an undiagnosed illness, and a stomach condition as due to an undiagnosed condition. The RO concluded that (1) the joint pain was determined to result from known clinical diagnoses of degenerative arthritis of the feet, tendonitis of the right shoulder, and lumbar strain; (2) the memory loss was not shown with chronic symptoms of a certain duration within the requisite period; and (3) the stomach condition was determined to result from a known clinical diagnosis of irritable bowel syndrome. R. at 243-45. The record on appeal does not contain any subsequent document from Mr. Tyrues to the RO, or from the RO to Mr. Tyrues, as to these three conditions. *See* R. at 1-402.

On April 20, 1998, the RO notified Mr. Tyrues that it was returning to the Board the matter of service connection for a lung disorder and enclosed an SSOC that discussed "service connection for a lung disorder." R. at 248-54. The SSOC reiterated the findings contained in the rating decision of the same date – denying benefits for a lung disorder on a direct basis and for lung problems, diagnosed as shortness of breath, as due to an undiagnosed illness. R. at 254. Mr. Tyrues responded to the SSOC stating that the issue in this case is entitlement to service connection for a lung disorder. R. at 256.

In September 1998, the Board (1) denied disability compensation based on direct service connection for a lung disorder because it found that the matter was not well grounded, and (2) remanded to the RO the issue of disability compensation based on presumptive service connection for an undiagnosed illness manifested by shortness of breath for further development to include an additional VA medical examination. R. at 265-76. The Board discussed the evidence of record as it pertained to symptoms of the lung and chest, including congestion, colds, and flu-like symptoms, and discussed evidence regarding pulmonary function tests, breath sounds, any pulmonary or pleural abnormalities, as well as diagnoses of pneumonia. R. at 269-70. The Board did not refer to any symptoms other than those involving the chest and lungs. The Board did not make any reference to the joint pain, stomach condition, and memory loss. *See* R. at 265-75. The Board instructed that, in regard

to the remanded matter, the VA medical examiner should render an opinion as to whether, for each symptom alleged by Mr. Tyrues, the symptom is attributable to a "known" clinical diagnosis, in light of the medical history and examination findings, and, if so, the examiner should identify the diagnosed disorder and render an opinion as to its etiology and date of onset. R. at 274. At the time it rendered the 1998 decision, the Board furnished Mr. Tyrues a notice concerning his appellate rights, which included notification that he could appeal the decision with regard to matters that had not been remanded. R. at 275-76. Mr. Tyrues did not file a Notice of Appeal (NOA) of this Board decision.

In December 1998, Mr. Tyrues underwent a second VA examination. R. at 285-87. The examiner reviewed Mr. Tyrues's claims file and opined that "[t]he history obtained from the veteran, the claim folder review, and the examination findings indicate that the veteran probably has chronic bronchitis, which gets worse when he gets exposed to dust, paint, etc." R. at 287.

In February 2000, the Board denied Mr. Tyrues's claim for disability compensation for "shortness of breath as a chronic disability resulting from an undiagnosed illness" because it found the evidence of record did not establish presumptive service connection. R. at 313. In December 2000, the Court vacated the February 2000 Board decision and remanded the matter to the Board pursuant to the parties' joint motion for remand. *See* R. at 339. The Court ordered

that VA provide Mr. Tyrues a respiratory examination and that it accomplish any notification and development required under the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096. R. at 340-41. In December 2001, Mr. Tyrues underwent a VA medical examination during which the examiner, Dr. Plump, diagnosed Mr. Tyrues as having "mild chronic bronchitis" with a history of refractory pneumonia and stated his "medical opinion that the patient's shortness of breath due to an undiagnosed illness is at least as likely as not due to the Gulf War service." R. at 350.

In July 2002, the Board's Case Development Unit (CDU) found that because Dr. Plump had attributed Mr. Tyrues's symptoms to both chronic bronchitis and to an undiagnosed illness, the results of the December 2001 VA examination were inconsistent, and additional development was needed. R. at 365-66. It ordered a further examination, by another examiner. It directed that the new examiner must (1) identify the diagnosed disorder to which he attributed any of Mr. Tyrues's symptoms; (2) explain his diagnosis; and (3) render an opinion as to the etiological basis and date of onset of such diagnosed disorder. R. at 371-72. Or, if the examiner was "unable to attribute the identified symptoms to a diagnosable disorder, he should so indicate" and also indicate "whether or not this could be related to Gulf War service." R. at 372. In October 2002, Mr. Tyrues underwent an additional VA medical examination, by a different VA examiner (not Dr. Plump), after which the examiner stated that

Mr. Tyrues "does not have any respiratory problems, symptoms[,] or signs at this time. . . . In my opinion he is allergic to certain paints and vapo[r] and these occa[s]ional respiratory symptoms are not related to the exposure of fumes in Gulf War." R. at 370. In April 2004, the Board issued the decision on appeal here. R. at 1-12.

II. ANALYSIS

A. Scope of the Appeal

1. Position of the Parties

The appellant argues that the Court has jurisdiction to review the September 1998 Board decision that both denied service connection for a lung disorder on a direct basis and remanded the issue of presumptive service connection for an undiagnosed illness manifested by shortness of breath. The appellant asserts that the 1998 Board decision "concerns the same claim" decided by the April 2004 Board decision here on appeal. Appellant's Brief (App.Br.) at 5. He contends that because both decisions address the same claim, i.e., service connection for a lung disorder, he has not lost his right to appeal the September 1998 Board decision denying direct service connection because, under *Harris v. Derwinski*, 1 Vet. App. 180 (1991), it would have been premature to file an appeal from that decision prior to the Board's finally deciding the matter of his entitlement to service connection on a presumptive basis in the April 2004 Board decision. App. Br. at 5; *Harris*, 1 Vet.App.

at 183 (holding that a Board decision that both denied one claim and remanded a second claim was not final because the denied claim was inextricably intertwined with the remanded claim).

During oral argument, the appellant maintained that he was seeking compensation for one disability, that is, a disability resulting from a lung problem (or a disability related to his lung), and that there are two separate theories of entitlement to VA compensation for his lung disorder: presumptive service connection under section 1117 and direct service connection. In support of his argument, the appellant argued that under *Roebuck*, *supra*, the finality of the September 1998 Board decision, which he contends incorrectly split the appellant's claim for service connection based on two theories of etiology, was "held in suspense" until the Board issued the April 2004 decision, and thus, the Court has jurisdiction to review the September 1998 Board decision.

The Secretary, on the other hand, argues that there are two separate claims involved here – a claim for entitlement to service connection for a diagnosed disability, i.e., a diagnosed lung condition, under the provisions of 38 U.S.C. § 1110[1] and a claim

[1] Section 1110 of title 38, U.S. Code, provides basic entitlement to compensation for a disability resulting from an injury or disease contracted in the line of duty in active military service. 38 U.S.C. § 1110; *see* 38 C.F.R. § 3.303(a) (2009) (provides compensation for "a particular injury or disease resulting in disability [that] was incurred coincident with service"). In order

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for entitlement to service connection for an undiagnosed disability under the provisions of 38 U.S.C. § 1117.[2] Secretary's Br. at 18-20. He asserts that the

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to establish entitlement to direct service connection for a disability, the appellant must show (1) "competent evidence of current disability [by way of] a medical diagnosis"; (2) "incurrence or aggravation of a disease or injury in service [by way of] lay or medical evidence"; and (3) "a nexus between the in-service injury or disease and the current disability [by way of] medical evidence." *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *see Hickson v. West*, 12 Vet.App. 247, 252 (1999).

[2] In order to establish entitlement to service connection under section 1117, the evidence must show that the appellant is a Persian Gulf veteran who (1) exhibits objective indications; (2) of a chronic disability; (3) which became manifest either during active military service in the Southwest Asia theater of operations during the Persian Gulf War, or "to a degree of 10% or more not later than [September 30, 2011]"; and the evidence must show "that (4) such symptomatology by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis." *Gutierrez v. Principi*, 19 Vet. App. 1, 7 (2004). Section 1117 provides for entitlement to compensation on a presumptive basis to a Persian Gulf War veteran who complains of having an undiagnosed illness that is (or illnesses that are) 10% or more disabling during the presumptive period established by the Secretary. 38 U.S.C. § 1117(a)(1)(A) and (B); *see Gutierrez*, 19 Vet.App. at 6. By definition, section 1117 only provides compensation for symptoms of a chronic disability that have not been attributed to a "known clinical diagnosis." 38 C.F.R. § 3.317(a)(1)(ii) (2009); *see Stankevich v. Nicholson*, 19 Vet.App. 470, 472 (2006) ("The very essence of an undiagnosed illness is that there is no diagnosis."); *Gutierrez*, 19 Vet.App. at 10 (a Persian Gulf War veteran's symptoms "*cannot* be related to any known clinical diagnosis for compensation to be awarded under section 1117"); 60 Fed. Reg. 6660, 6665 (Feb. 3, 1995) ("The undiagnosed illness provisions of Public Law 103-446, as

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claims involve two separate legal and factual bases for entitlement to service connection. *Id.* He contends that the Court lacks jurisdiction to review the 1998 Board decision because the NOA was filed with the Court 5 ½ years after the September 1998 Board decision, long past the 120-day filing deadline for an appeal to this Court and the record reflects no motion for reconsideration was timely filed with the Board to toll the statutory deadline. *Id.* at 16-17.

As discussed below, the Court need not decide whether the appellant had two separate claims – one for direct service connection for a lung disability and one for presumptive service connection for a chronic disability resulting from an undiagnosed illness – or a single claim for disability compensation based on two separate theories that might support service connection and the award of benefits. This is because, in either case, the 1998 Board decision was a final decision, and the appellant failed to file an NOA with the Court within 120 days after notice of the mailing of that decision, as required under 38 U.S.C. § 7266(a) to invoke our jurisdiction.

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implemented by § 3.317, were specifically intended to relieve the unique situation in which certain Persian Gulf War veterans found themselves unable to establish entitlement to VA compensation because their illnesses currently cannot be diagnosed.").

2. General Law

This Court's jurisdiction is governed by 38 U.S.C. §§ 7252(a) and 7266(a). Section 7252 provides that this Court "shall have exclusive jurisdiction to review decisions of the [Board]." 38 U.S.C. § 7252(a). Section 7266(a) provides that to obtain review by this Court "of a final decision of the Board of Veterans' Appeal," a person "adversely affected by such decision" must file an NOA "with the Court within 120 days after the date on which the notice of the decision is mailed pursuant to section 7104(e) of this title." 38 U.S.C. § 7266(a). Accordingly, this Court has appellate jurisdiction to review final Board decisions. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

The Federal Circuit in *Maggitt v. West* discussed our jurisdictional statute. The Federal Circuit held that our Court erred when it held that it did not have jurisdiction to hear arguments raised for the first time before our Court. In reaching that decision, the Federal Circuit said that "[t]he government is correct in the assertion that the jurisdiction of the Veterans Court by statute only reaches to a 'decision of the Board.'" 202 F.3d 1370, 1375 (Fed. Cir. 2000) (quoting 38 U.S.C. § 7252(a)). The Federal Circuit then said: "A 'decision' of the Board, for purposes of our Court's jurisdiction under section 7252, is the decision with respect to the benefit sought by the veteran: those benefits are either granted . . . , or they are denied." *Id.* at 1376. In *Kirkpatrick v. Nicholson*, the Federal Circuit subsequently noted that this definition of "decision" in section 7252 was "in line

with the definition of a Board decision in 38 U.S.C. § 7104, the Board's jurisdictional statute," which provides that "'[e]ach decision of the Board shall include . . . an order granting appropriate relief or denying relief.'" 417 F.3d 1361, 1364 (Fed. Cir. 2005) (quoting 38 U.S.C. § 7104(d)).

The Board's 1998 decision in this case contained an order denying relief. *See Maggitt*, *supra.* It specifically denied benefits – entitlement to service connection for a lung disorder on a direct service-connected basis. Pursuant to its remand directives, however, the Board decision also left open the possibility that the appellant may be entitled to benefits for a chronic disorder manifested by shortness of breath, due to an undiagnosed illness, on a presumptive basis. Therefore, the Court must decide whether the remand of entitlement to service connection for a chronic disorder manifested by shortness of breath rendered nonfinal the Board's decision to deny benefits for a lung condition based on direct service connection. In other words, the question is whether the 1998 Board decision that adversely resolved direct service connection for a lung condition and also remanded to the RO another matter was "final" with regard to the resolved matter for purposes of judicial appeal to this Court such that the appellant was required to appeal that decision within 120 days after it issued.

3. Roebuck *and* Joyce

In resolving the question, the Federal Circuit's remand of the instant case suggested that we specifically consider two recent decisions. We first consider this Court's decision in *Roebuck*, *supra*, where the Court addressed the finality of a Board decision. The Court notes that *Roebuck*, by its terms, involved a "unique" set of circumstances where the Board issued a decision in two separate parts, explicitly stating its intent to do so, without remanding a matter to the RO. *Roebuck*, 20 Vet.App. at 316. Specifically, Mr. Roebuck claimed entitlement to service connection for a lung disorder as secondary to tobacco use and nicotine dependence and also as secondary to asbestos exposure. In December 2002, the Board issued a decision denying service connection for a lung disorder as secondary to nicotine dependence and, in the same decision, expressly stated that it would also issue a separate decision concerning the asbestos exposure theory of causation. Less than one year later, the Board issued another decision denying service connection for a lung disorder as secondary to asbestos exposure. *Id.* at 317. The Court held that the first Board decision was not final where, "in the unique circumstances" presented, the Board (1) bifurcated its decision of Mr. Roebuck's lung disorder claim, (2) denied service connection for a lung disorder under a nicotine dependence theory, and (3) "stated that it would 'prepare a separate decision addressing [the issue]' of service connection for a lung

disorder under an asbestos exposure theory." *Id.* at 309, 316.

The *Roebuck* Court held that

> when a claimant raises more than one theory in support of a claim during the time while that claim is still pending before VA, *if the Board* bifurcates those theories or arguments *and addresses them in separate decisions*, the time for appeal is not ripe until *the Board* issues a final decision denying all theories [and, u]nder those circumstances, the 120-day requirement for filing a[n NOA] will not begin to run *until the Board* has denied all theories in support of the claim that it has identified for consideration.

Id. at 315-16 (emphasis added). In holding that the first Board decision was nonfinal, the Court noted that "to adjudicate a claimant's appeal of one theory of a claim while **the Board** is still deliberating on another theory supporting that same claim, our efforts would be potentially duplicative and unnecessary." *Id.* at 315 (emphasis added). Thus, among the unique circumstances of *Roebuck* was the Board's issuance of its decision in two parts without remanding either theory to the RO for further development and readjudication. *Id.* at 316 (noting that the Board's decision "was issued by the Board in two parts separated by less than a year"). Accordingly, *Roebuck* is limited to the situation where the Board, in its decision denying one theory, specifically states that the Board will be issuing, without a remand to

the RO, a second decision on another theory of the same claim. To read *Roebuck* more broadly creates a new exception to the rule of finality and ignores the fact that *Roebuck* explicitly was based on unique circumstances.

Thus, *Roebuck* is not dispositive of the issue here regardless of whether the appellant is deemed to have filed two separate claims or one claim. First, if we assume the appellant sought benefits for two *separate disabilities* – a diagnosed lung disorder, described as both pneumonia and bronchitis, and an undiagnosed chronic condition manifested by shortness of breath alleged to be the result of his service in the Persian Gulf – *Roebuck* is simply inapposite because the Court in that case found that there was one claim. *Id.* at 315-16; *see also Elkins v. Gober*, 229 F.3d 1369, 1376 (Fed. Cir. 2000) (holding that "[b]ecause . . . each 'particular claim for benefits' may be treated as distinct for jurisdictional purposes, a veteran's claims may be treated as separable on appeal"). Second, if we assume the appellant raised two theories in support of a single claim for VA benefits for a lung condition – direct service connection and presumptive service connection available to Persian Gulf War veterans – the facts are distinguishable from *Roebuck* because here the Board issued a final decision with regard to benefits based upon direct service connection, and remanded to the RO for consideration of benefits based upon presumptive service connection, whereas in *Roebuck*, the Board denied one theory and

expressly stated that it would issue a second Board decision on the second theory.

We next consider the Federal Circuit's decision in *Joyce*, *supra*, which held that a decision of our Court was not final where our Court had affirmed in part, reversed in part, and vacated in part a Board decision finding no clear and unmistakable error (CUE) in an RO decision denying disability compensation benefits and remanding a matter to the Board. 443 F.3d at 849-50. Our Court affirmed the Board's determination of no CUE as to the RO's finding that the presumption of soundness was rebutted. We reversed the Board determination of no error in the RO finding that the presumption of aggravation had been rebutted under the applicable regulation and remanded for the Board to determine whether the RO's error was outcome determinative. We vacated the Board's denial of CUE and remanded for readjudication on the service-connection question. The appellant appealed to the Federal Circuit.

The parties in *Joyce* disagreed as to whether there was a single claim – one for service connection that is established either through the presumption of soundness or the presumption of aggravation – or two separate claims – one for service connection and one for aggravation. The Federal Circuit stated that it need not decide which view of the underlying claims was correct because under either view "there is a lack of finality." 443 F.3d at 849. The Federal Circuit concluded that if there is only a single claim, review by the Federal Circuit was unavailable because the

remand order did not satisfy the test announced in *Williams v. Principi*, 275 F.3d 1361 (Fed. Cir. 2002), which held that the Federal Circuit may review a nonfinal remand order if three conditions were met. *Joyce*, 443 F.3d at 850. The Federal Circuit stated that if there were separate claims for service connection and aggravation, *Elkins*, 229 F.3d at 1376, was applicable, and the "assertedly separate claims are inextricably intertwined because both claim compensation for the same disability." 443 F.3d at 850. The Federal Circuit concluded that "[r]eview of the Veterans Court's decision as to the service connection claim is unavailable under *Elkins* because it would 'disrupt the orderly process of adjudication.'" *Id.*

We conclude that the Federal Circuit's decision in *Joyce*, similar to *Roebuck*, does not answer the question now before the Court. *Joyce* discussed the reviewability of decisions of this Court by the Federal Circuit. *Joyce* did not discuss the finality of a Board decision and the jurisdictional basis on which this Court reviews Board decisions. In *Joyce*, the Federal Circuit expressly noted: "Our review of decisions of the Court of Appeals for Veterans Claims is governed by 38 U.S.C. § 7292. While that statute does not explicitly impose a final judgment requirement, we have nonetheless 'generally declined to review nonfinal orders of the Veterans Court' on prudential grounds." 443 F.3d at 849 (quoting *Williams*, 275 F.3d at 1363). Accordingly, the Federal Circuit in *Joyce* did not review or interpret the statutes from which this Court derives its jurisdiction – 38 U.S.C. §§ 7252(a)

and 7266(a). To the extent *Joyce* is argued to be instructive, it did not resolve the issue of one claim versus two claims, instead finding that either approach would yield the same result. And, it did not resolve the issue of whether a decision deemed final by the Board with regard to one claim or one theory supporting a claim for benefits, and for which notice of appellate rights had been provided to the claimant – but for which no appeal was filed within 120 days of that Board decision – nevertheless could be appealed when the Board ultimately rendered a decision on the remaining claim or theory that might support an award of benefits.

4. Elkins *and Administrative Finality*

In *Elkins*, the Federal Circuit provided guidance as to the applicable jurisdictional finality standard in the context of appeals from decisions that do not dispose of all claims but instead include a remand. *Elkins* established that judicial review is available for a claim for which final judgment has been entered even if other claims presented in the same appeal have been remanded. *Id.* The Federal Circuit in *Elkins* held that it had jurisdiction to review the veteran's headache claim and neck argument on appeal from our Court notwithstanding our remand of the veteran's back claim and notwithstanding the fact that all claims were related to the same accident and were presented to this Court in a single appeal. *Elkins*, 229 F.3d at 1374. This Court had affirmed the Board's denial of the headache claim and had rejected

Mr. Elkins's argument that the medical evidence regarding his headaches also established a claim for service-connected neck pain. The Federal Circuit explained that in deciding that it could treat the claims as separable on appeal, it was adopting the approach in *Dewey Electronics Corp. v. United States*, 803 F.2d 650, 654 (Fed. Cir. 1986). The Federal Circuit stated that "[t]he relevant consideration, in determining whether an administrative adjudication is sufficiently 'final' is 'whether the process of the administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.'" *Elkins*, 229 F.3d at 1373 (quoting *Dewey*, 803 F.2d at 654). Applying this *Elkins* standard to an appeal from our Court, the Federal Circuit concluded that, because the legal issues presented on appeal were all distinct (i.e., whether Mr. Elkins had presented "new and material evidence" sufficient to reopen his claim for back injuries, whether he had presented a "well grounded" claim for headaches, and whether the medical reports furnished with his headache claim support a claim for neck injuries), its review of our Court's decision with respect to the headache and neck matters would not "disrupt the orderly process of adjudication below with respect to the remanded [back injury] claim." *Id.* at 1375-76.

In discussing its practice of treating a veteran's distinct issues as separable on appeal (and in allowing

sequential appeals on separate issues or claims), the Federal Circuit in *Elkins* discussed its prior decisions regarding similar matters. *See Elkins*, 229 F.3d at 1374-75. The Federal Circuit noted its prior holdings that a veteran's overall claim for benefits is comprised of separate issues and that our Court has jurisdiction to consider an appeal concerning one or more of those issues. *See*, *e.g.*, *Grantham v. Brown*, 114 F.3d 1156, 1158-59 (Fed. Cir. 1997) (elements of a claim may be appealed sequentially to U.S. Court of Appeals for Veterans Claims); *see also Barrera v. Gober*, 122 F.3d 1030, 1032 (Fed. Cir. 1997) (holding that the U.S. Court of Appeals for Veterans Claims has jurisdiction to review a decision concerning one of the issues that comprise a claim, i.e., the issue of disability rating). The Federal Circuit stated that, unlike district court cases where a plaintiff must present all claims for relief arising from an event in a single complaint and then appeal all at once, "there is no requirement that a veteran's various claims for relief be simultaneously filed and adjudicated, either upon initial review or on appeal." *Elkins*, 229 F.3d at 1375. The Federal Circuit further stated: "Rather, we have recognized that the unique statutory process of adjudication through which veterans seek benefits may necessarily require that the different issues or claims of a case be resolved at different times, both by the agency of original jurisdiction and on appeal." *Id.*

Against this backdrop, we conclude that a final Board decision denying VA disability compensation based upon direct service connection, while the

consideration of benefits based upon presumptive service connection is still under adjudication, constitutes a final decision subject to separate appeal to the Court.[3] Our conclusion is consistent with the recognition in *Elkins* that VA's "unique statutory process of adjudication" does not necessarily require different issues to be resolved all at once. *See Elkins*, 229 F.3d at 1375-76. In meritorious cases where the Board denies benefits based on a particular issue with distinct criteria and remands for further adjudication another issue of establishing entitlement to benefits, a veteran might otherwise have to wait years for resolution and possibly benefits to which he or she is entitled. Indeed, as illustrated by the circumstances

[3] The Court recognizes the Federal Circuit's decision in *Bingham v. Nicholson*, 421 F.3d 1346 (Fed. Cir. 2005), which held that all theories of service connection were disposed of when the Board decision there had denied service connection. Unlike the factual circumstances presented in *Bingham*, however, where the Board denied a claim for service connection on one theory and was silent as to other theories of service connection, in the present case, the Board specifically remanded a separate theory for development, thereby foreclosing any argument that its denial of direct service connection could be interpreted as a final decision on the separate theory of presumptive service connection. *See also D'Aries v. Peake*, 22 Vet.App. 97 (2008) (exercising jurisdiction over appeal of Board decision that denied service connection for cause of veteran's death even while claim for DIC was denied in a separate Board decision and remanded in a separate Court decision); *Andrews v. West*, 16 Vet.App. 384 (1999) (table) (exercising jurisdiction over appeal of Board decision denying benefits based on direct service connection while benefits based on secondary service connection were still being adjudicated).

in the instant case, it took VA *more than five years* after its decision denying direct service connection for a lung disability under section 1110 to complete the remand proceedings pertaining to entitlement to the presumption of service connection for undiagnosed illnesses incurred in, or manifested during a presumptive period following, service in the Persian Gulf under section 1117.

In addition, to require a final decision with respect to all claims for benefits, or theories in support of a claim for benefits – regardless of whether they raise distinct questions, are based on different statutory provisions, or rely on different causes of a disability – may have the unintended effect of encouraging the Board to delay making a determination on any matter until all matters are fully developed and ready for disposition. In such a case, if the Board decides one matter and remands another matter, when the remanded matter is later ready for the Board's disposition (after all instructions on remand have been fulfilled), the Board would be required to revisit its decision on the first matter to ensure that it currently complies with all law and regulations. It is unlikely that the Board will spend its resources adjudicating the first matter if that were the law, and the Board might very well decide that it would be more efficient to delay any adjudication until all claims for benefits, or theories in support of a claim for benefits, were ready for a decision. The veteran would thus be denied the opportunity of judicial review of an adverse decision until all issues

addressed in the Board decision or all possible bases for supporting a claim for benefits have been finally decided. Such an outcome would serve neither the veteran nor the VA's interest in providing a timely award of benefits or achieving final resolution of claims.

5. Reviewability Versus Finality of a Board Decision

The Court recognizes that this Court's decision in *Harris* discussed this Court's jurisdictional statutory requirement of a "final Board decision" and the question of when a Board decision is appealable. 1 Vet.App. at 181-83. In *Harris*, the Court held that a Board decision that denied an increased rating for service-connected anxiety neurosis was not a final decision over which this Court had jurisdiction because the claim was "inextricably intertwined" with a claim for service connection for a heart disorder that the Board had referred to the RO. *Id.* at 183. The Court in *Harris* stated that it would neither review Board decisions "in a piecemeal fashion nor unnecessarily interfere with the [VA] deliberative process." *Id.* The Court stated:

> A decision by the RO to grant appellant's referred heart disorder claim could have a significant impact upon appellant's claims for an increased rating for anxiety neurosis. This, in turn, could render any review by this Court of the decision on the anxiety neurosis

> claim meaningless and a waste of judicial resources.

Id. at 183. Accordingly, the Court determined that piecemeal review could render a decision on one claim "meaningless" and would be a "waste of judicial resources." *Id.* The Court noted that the evidence in support of both claims was "replete with statements that the veteran's mental state was a result of his physical condition," and further noted that the crux of the appellant's claim for benefits was that "his heart disorder [was] the cause of his anxiety neurosis." *Id.* Because the claims appeared "so closely tied" together, the Court concluded that the Board decision did not constitute a final decision and dismissed the appeal for lack of jurisdiction. *Id.*

The *Harris* court determined that a holding by the Court that claims are inextricably intertwined – i.e., where a referred claim could have a significant impact on a denied claim that is being appealed – mandates dismissal of the appeal. The Court today overrules *Harris* to the extent it stands for the proposition that this Court has no jurisdiction over a Board decision that denied a claim if that claim is "inextricably intertwined" with another claim that the Board remanded. The Court has jurisdiction over such matters on direct appeal, but may decline to exercise its jurisdiction in such cases, as we frequently do. *See*, *e.g.*, *Hunt v. Nicholson*, 20 Vet.App. 519, 525-26 (2006) (declining to review denial of entitlement to vocational rehabilitation benefits and remanding for readjudication because issue was dependent on –

"inextricably intertwined" with – whether, on remand, the Board reopens and grants a claim for service connection) (citing *Harris*, *supra*); *Anglin v. West*, 11 Vet.App. 361, 367 (1998) (remanding claim for a bladder disorder, for which there was medical evidence that it was connected to a back problem, because it was "inextricably intertwined" with a claim for a back condition that the Court was remanding) (citing *Harris*, *supra*); *Holland v. Brown*, 6 Vet.App. 443, 447 (1994) (holding that a Board decision denying an increased rating for service-connected rheumatoid arthritis is final even though Board referred to RO "a TDIU rating claim" based on rheumatoid arthritis because referred claim "may not necessarily affect the claim on appeal"). Overruling *Harris*, we now hold that where a Board decision purports to be a final decision, the Board issues a notice of appellate rights, and the appellant timely appeals to the Court, this Court has jurisdiction to review the Board decision for error. However, on review, the Court retains its discretion to determine at the threshold that a claim or theory denied by the Board in any such decision or portion of a decision on review is so inextricably intertwined with matters still pending before VA that it should be remanded to VA to await development or disposition of a claim or theory not yet finally decided by VA.[4]

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[4] Contrary to the view expressed by Judge Hagel in his separate opinion, we observe that this Court's decision in *Harris v. Derwinski*, 1 Vet. App. 180 (1991), is implicated, and its

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We make clear today, that this Court's *jurisdiction* to review a Board decision denying a claim is not controlled by whether the claim denied by the Board is "inextricably intertwined" with another claim that was either remanded or referred by the Board to the RO because the facts underlying the two claims are so closely tied together. Rather, this Court's jurisdiction is controlled by whether the Board issued a "final decision" – i.e., denied relief by either denying a claim or a specific theory in support of a claim and provided the claimant with notice of appellate rights. 38 U.S.C. § 7266(a); *see Percy v. Shinseki*, 23 Vet.App. 37, 45-46 (2009) (noting imprecise use of term "jurisdictional" in caselaw and VA regulations); *see also Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 2365-66, 168 L. Ed. 2d 96 (2007) (defining as jurisdictional, limits in statute as to when and under what conditions a

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discussion necessary, regardless of whether this case involves one claim or two claims. Even if this Court were to hold that there are two claims involved here, *Harris* dictates that we determine, as part of this appeal, whether the "claim" for service connection for a lung condition on a direct basis that was denied in 1998 is "inextricably intertwined" with the "claim" for presumptive service connection for a chronic disability resulting from an undiagnosed illness based on service in the Persian Gulf. If so, *Harris* would not have permitted this Court to have jurisdiction over an appeal filed within 120 days of the 1998 denial but would permit jurisdiction *now* to review the 1998 denial as part of the current appeal of the denial of service connection under the presumptive provisions for Persian Gulf War veterans. Because a determination as to whether claims are inextricably intertwined does not properly determine this Court's jurisdiction, we overrule that aspect of *Harris*.

court may hear a case). We hold that only after the Court determines that it has jurisdiction does it then engage in consideration of questions concerning whether the appeal involves multiple claims or issues that are inextricably intertwined. If we find that the matter on appeal is inextricably intertwined with an issue or claim still pending before VA, the Court generally will decline, for reasons of judicial economy or on prudential grounds, to review the merits of the claim or issue adjudicated in the Board decision then before the Court, and remand it for further adjudication, as appropriate, with the other "inextricably intertwined" matters still being adjudicated below.

Following today's decision, a claimant will no longer be presented with the dilemma of whether he should appeal or risk having his right to appeal vitiated for failure to timely appeal. *See*, *e.g.*, *Gurley v. Nicholson* 20 Vet.App. 573, 575 n.1 (2007). It is not the Court's province to dictate how VA implements its statutory authority to dispose of appeals in a timely and efficient manner so long as it permissibly does so within controlling statutes. *See Ramsey v. Nicholson*, 20 Vet.App. 16, 27 (2006) ("The general authority of the Secretary to interpret and apply the relevant law and of the Board to dispose of appeals in a timely manner authorizes the Secretary to manage the Board in its dispositions of cases and to consider the relevant law in its control of the dispositions of the appeals pending on the Board's docket and to do so with economy of time and effort.").

While it does not fall to this Court to design or redesign the VA adjudication process, it is our province to consider a timely appeal from a claimant who has been denied relief based on one theory, has received notice of his appellate rights, and who argues that the Board erred in issuing the denial. *See*, *e.g.*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 821, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) (Stewart, J., joined by Blackmun and Stevens, JJ., dissenting) ("[F]ederal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'"). In such a case, the Court can then determine whether the benefits denied or limited are inextricably intertwined with a remanded issue or claim, or whether the Board erred in issuing the denial or limitation of benefits that was appealed. Parties are well-served by a process that allows the Court to review assertedly final decisions to determine (1) whether one issue on which the Board denied benefits is inextricably intertwined with other issues that the Board remanded, and (2) whether such a Board decision should be reversed, modified, or the matter remanded, based on Board error, including misapplication of the law, failure to develop a complete record, or other defects that would otherwise not be addressed for years thereafter. By a veteran's timely exercise of appellate rights, errors by the Board may be corrected as early in the process as possible, rather than many years later, when remand proceedings on a separate matter are completed. Claimants not satisfied with a clear, final decision of the Board, accompanied by notice of their appellate

rights, should appeal any such decision in a timely manner (or request Board reconsideration) to preserve those appellate rights. A claimant should understand that "Board denial" on the issues coupled with a notice of appellate rights means "file an appeal or the denial becomes final," because it is in the control of the claimant, not the Court or the Secretary, whether to appeal once the Board issues its decision. If an appeal is filed, the Court will determine issues of finality and whether the issues or claims are inextricably intertwined on a case-by-case basis. Failure of a claimant to appeal (or seek reconsideration) presents the risk, as we see in the case before us, that the matters finally decided by the Board will not be appealable after the time to appeal passes.

B. The Finality of the September 1998 Board Decision

In the September 1998 decision, the Board considered the issues of appellant's entitlement to benefits for a lung disability based either directly or through the presumption of service-connection under section 1117. The Board took two actions with respect to his appeal for benefits. First, the Board denied benefits based on entitlement to service connection on a direct basis. R. at 272 ("The claim for entitlement to service connection for a lung disorder on a direct basis is denied."). The Board determined that there was "no competent medical evidence linking the veteran's current lung disorder on a direct basis to

service" (R. at 267), and thus found that issue not "well-grounded"[5] (R. at 267, 271). Second, the Board remanded, for further development, entitlement to service connection under 38 U.S.C. § 1117 for a chronic disorder manifested by shortness of breath, due to an undiagnosed illness, secondary to Persian Gulf War service. R. at 272. The Board stated that it was "unclear whether there [was] medical evidence to support the veteran's claimed respiratory symptoms or whether any of the symptoms are affiliated with a diagnosed illness" and directed the RO to schedule a VA Persian Gulf examination. R. at 273-74.

At the time of the 1998 decision, the Board considered its denial final and so notified the appellant. At the time the Board issued its September 1998 decision, the Board notified the appellant as follows:

> NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C. [] § 7266 . . . , a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to [the Court] within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was

[5] The law in effect in 1998 provided that claims must be "well grounded" in order to invoke VA's duty to assist in their development. *See* 38 U.S.C. § 5107. The Veteran's Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000), amended section 5107 to eliminate the requirement of well-groundedness. *See Luyster v. Gober*, 14 Vet.App. 186 (2000) (per curiam order).

> before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. . . . The date that appears on the face of this decision constitutes the date of mailing and the copy of this decision that you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals. Appellate rights do not attach to those issues addressed in the remand portion of the Board's decision, because a remand is in the nature of a preliminary order and does not constitute a decision of the Board on the merits of your appeal. 38 C.F.R. § 20.1100(b) (1997).

R. at 275-76. As quoted above, the Board specifically noted that the appellate rights did not attach to the matter that was remanded, which constituted only a "preliminary" decision of the Board, and that a remand "does not constitute a decision of the Board on the merits of your appeal." R. at 276. The Board's notice, therefore, informed the appellant that the appellate rights pertained to the Board's denial of service connection for a lung disability on a direct basis, as the matter that was not remanded. R. at 276. This is consistent with the Court's caselaw that the Board's remand of a veteran's claim is not an adverse final decision over which the Court had jurisdiction. *See Acosta v. Principi*, 18 Vet.App. 53, 59 (2004); *Breeden*, 17 Vet.App. at 475. The appellant was thus on notice that VA considered the September 1998 decision of the Board to be a final decision on direct service connection for a lung disability. The

Court notes that the appellant does not raise any argument that challenges either the sufficiency of the notice of appellate rights accompanying the Board decision or his receipt of that decision or his receipt of the notice of appellate rights. *See* App. Br. at 1-16; Reply Br. at 1-7.

The appellant did not file an NOA of the Board's September 1998 decision within 120 days of the date that VA mailed notice of the September 1998 decision to him nor did he seek reconsideration from the Board. *See Reed v. Peake*, 23 Vet.App. 64 (2008) ("The only exception to this 120-day rule is in those cases in which the claimant has (1) filed a motion for Board reconsideration within 120 days after the mailing date of the Board's decision; and then (2) filed an NOA within 120 days after the Board Chairman has denied the reconsideration motion"); *Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991). Just as an appellant has an obligation to cooperate in the development of evidence pertaining to his claim because failure to do so could subject him to the risk of an adverse adjudication based on an incomplete and underdeveloped record, *see Kowalski v. Nicholson*, 19 Vet.App. 171, 178 (2005), failure to appeal a purportedly final Board decision may adversely affect an appellant if the Court agrees that the decision is final and therefore we have no jurisdiction over the claim. Thus, as stated above, veterans who receive a purportedly final decision denying benefits from the Board should timely appeal that denial, regardless of whether other claims or issues remain pending, or

they run the risk of finding years later that in failing to appeal they have thereby forfeited their appellate rights concerning the earlier decision. Here, rather than protecting his appellate rights at the time of the 1998 Board decision, the appellant waited and only filed an NOA after the April 2004 Board decision. He now argues that the September 1998 decision was not final (App. Br. at 5), but that argument is not persuasive.

Based on the totality of the circumstances of this case, the Court holds that the September 1998 Board decision was final concerning the issue of section 1110 compensation for direct service connection for a lung disability. *See Bingham*, 421 F.3d at 1349 ("We cannot create a third exception to the rule of finality."); *Cook v. Principi*, 318 F.3d 1334, 1337 (Fed. Cir. 2002) (en banc) (recognizing only two statutorily recognized exceptions to the rule of finality, neither of which are applicable here). Because the appellant did not file an NOA within 120 days after VA mailed notice of the Board's final September 1998 decision, the Court lacks jurisdiction to review the September 1998 Board decision. *See* 38 U.S.C. § 7266(a).[6] The Court is

[6] In viewing the September 1998 Board denial as a nonfinal decision, our colleagues, Judges Lance and Schoelen, read our panel decision in *Roebuck* as creating a new exception to the rule of finality that is inconsistent with established precedent. *See Cook*, 318 F.3d at 1337 (discussing two statutory exceptions to the rule of finality: (1) a finding of clear and unmistakable error under 38 U.S.C. 5109A or 7111, and (2) the receipt of new and material evidence to reopen a claim under section 5108); *see*

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thus limited to a review of the merits of the April 2004 Board decision denying service connection on a presumptive basis for symptoms of a chronic disability resulting from an undiagnosed illness from military service in the Persian Gulf.

C. Merits of the August 2004 Board Decisions

With regard to the April 2004 Board decision, the appellant argues only that the Board erred because it

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also Knowles v. Shinseki, 571 F.3d 1167 (2009) (noting that "the law does not recognize a freestanding 'finality claim' filed after the period for direct review has expired"). Contrary to this view, we observe that if Mr. Tyrues believed that the Board had erred in 1998 in denying him relief under a direct theory of service connection, his avenue to remedy that error was to file a direct appeal of the 1998 Board decision and argue for a remand to correct any errors, including any error in adjudicating the matter or in not remanding the matter for further development. Moreover, the dissent ignores our caselaw in which this Court reviews a Board decision and determines whether a matter decided by the Board is inextricably intertwined with a matter remanded to the Agency. *See*, *e.g.*, *Bagwell v. Brown*, 9 Vet.App. 337, 339-40 (1996). In addition, our colleagues' current view is difficult to reconcile with their recent opinion in *Brokowski v. Shinseki*, 23 Vet.App. 79, 86-90 (2009) (exercising jurisdiction and affirming Board decision as to effective date issue even though Board had remanded the issue of an appropriate disability rating). Significantly, the dissent's current view disregards the Court's role in providing prompt judicial review of Board decisions that deny relief to veterans and would have this Court's role reduced to a small, flickering light of hope at the end of the seemingly endless processing tunnel that often characterizes VA adjudications.

had a duty, under 38 C.F.R. § 19.9, to seek clarification of Dr. Plump's December 2001 medical opinion "before[,] or in addition to," ordering an additional VA medical examination. App. Br. at 10. He contends that, in ordering an additional VA medical examination in lieu of seeking clarification of Dr. Plump's opinion, VA violated its duty to assist. App. Br. at 10-12. At oral argument, counsel for the appellant asserted that VA's request for an additional medical examination "impermissibly narrowed" VA's consideration of Dr. Plump's December 2001 opinion and that the appellant was prejudiced by VA's failure to seek clarification of Dr. Plump's opinion because his opinion was favorable evidence that, if clarified, could have substantiated the appellant's claim for service connection on a presumptive basis for symptoms of an undiagnosed illness.

The Board's CDU noted that in providing the December 2001 VA medical opinion, Dr. Plump "found that the veteran suffered from a known diagnosis of mild chronic bronchitis, but offered an opinion that the veteran's 'shortness of breath due to undiagnosed illness [was] at least as likely as not due to his Gulf War service.'" R. at 365. The CDU concluded that because "these findings appear to be inconsistent, another examination must be scheduled." *Id.* The CDU then ordered that VA schedule the appellant for a VA Persian Gulf examination and indicated that the appellant "must be scheduled with an examiner other than the examiner of 12/13/01, Dr. Plump." *Id.*

At the time of the CDU's July 2002 request, § 19.9 provided, in relevant part:

> (a) *General.* If further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision, a Board Member or panel of Members may:
>
> > (1) Remand the case to the agency of original jurisdiction, specifying the action to be undertaken; or
> >
> > (2) Direct Board personnel to undertake the action essential for a proper appellate decision.

38 C.F.R. § 19.9 (2002). The plain language of § 19.9 does not limit the Board to seeking clarification of the evidence, nor has the Court adopted the "mandatory clarification" interpretation of § 19.9 that the appellant advances in his brief. Rather, the regulation contemplates situations in which the Board may choose to obtain "further evidence" instead of requiring clarification of the existing evidence; and, it is well established that the Board has the discretion to determine whether further development is needed to make a decision on a claim. 38 C.F.R. § 19.9(a) (2002); *see Shoffner v. Principi*, 16 Vet.App. 208, 213 (2002); *Winsett v. West*, 11 Vet.App. 420, 426 (1998) ("[W]hether the Board chooses to refer a particular case for an independent medical opinion is entirely within its discretion."); *see also* 38 U.S.C. § 7109(a) (the Board may seek an advisory medical opinion when such an opinion "is warranted by the medical

complexity or controversy involved"); 38 C.F.R. § 3.304(c) (2009) ("The development of evidence in connection with claims for service connection will be accomplished when deemed necessary.").

However, it is equally well established that VA must develop claims and gather evidence in a neutral manner. *See Austin v. Brown*, 6 Vet.App. 547, 553 (1994) ("[B]asic fair play requires that evidence be procured by the agency in an impartial, unbiased, and neutral manner."). In seeking a medical opinion, VA "may not suggest an answer or limit the field of inquiry by the expert." *Bielby v. Brown*, 7 Vet.App. 260, 268 (1994); *see Colayong v. West*, 12 Vet.App. 524, 534 (1999) (holding that the RO's request to a VA medical examiner to "feel free to refute the private physician's report" was fatally flawed and compromised the fairness of the adjudication process). Moreover, "VA may not pursue . . . development if the purpose is to obtain evidence against the claim." *Hart v. Mansfield*, 21 Vet.App. 505, 508 (2007); *see Mariano v. Principi*, 17 Vet.App. 305, 312 (2003) ("Because it would not be permissible for VA to undertake such additional development if a purpose was to obtain evidence against an appellant's case, VA must provide an adequate statement of reasons or bases for its decision to pursue further development where such development reasonably could be construed as obtaining additional evidence for that purpose."); *Rose v. West*, 11 Vet.App. 169, 172 (1998) (noting that "it is not the function of judicial review simply to accord the government a remand to obtain

. . . evidence" that rebuts the appellant's showing of a nexus between his in-service injury and a current diagnosed disability).

In its April 2004 decision, the Board found that VA "ha[d] made reasonable and appropriate efforts to assist the appellant in obtaining the evidence necessary to substantiate the claim currently under consideration, to include several VA examinations." R. at 4. With regard to Dr. Plump's December 2001 medical opinion, the Board noted "that despite the finding of an undiagnosed illness relating to respiratory symptomatology, it is noteworthy that the examiner did indeed offer a specific diagnosis of mild chronic bronchitis." R. at 11. The Board found that "[a] diagnosis of both an undiagnosed illness and a diagnosed condition pertaining to the same symptoms is inconsistent." R. at 11-12.

Dr. Plump rendered the following opinion in December 2001:

> DIAGNOSIS: 1) Mild chronic bronchitis. 2) Diffusion capacity and spirometry within normal limits. 3) Refractory pneumonia March 1994.
>
> OPINION: It is this provider's medical opinion that the patient's shortness of breath due to an undiagnosed illness is at least as likely as not due to the Gulf War service. This provider is unable to render an opinion

> as to the etiological basis of the disorder and its date of onset.

R. at 350.

Accepting the Board's view that Dr. Plump's diagnosis and opinion are inconsistent,[7] it is wholly unclear why the Board directed that VA provide a new medical examination, rather than simply seek clarification of Dr. Plump's opinion. It is equally unclear why the Board directed that the new examination be provided by an examiner "other than" Dr. Plump. R. at 365.

The Board's failure to adequately explain the reasons for its order leaves the Court to speculate as to its reasoning; such speculation reasonably includes the possibility that the purpose was to avoid a possible favorable opinion from Dr. Plump. This is not

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[7] Although the Board's view is that Dr. Plump's opinion is inconsistent with his diagnosis, the Court notes that it is also possible that Dr. Plump intended to diagnose the appellant as having both mild chronic bronchitis and an undiagnosed illness manifested by shortness of breath. Pursuant to 38 U.S.C. § 1117, governing compensation for disabilities occurring in Persian Gulf War Veterans, compensation is available for either an undiagnosed illness or a "medically unexplained chronic multisymptom illness," manifested by "signs or symptoms involving the upper or lower respiratory system." 38 U.S.C. § 1117(a)(2)(B), (g)(8). Dr. Plump's opinion therefore need not be read as inconsistent. Read as diagnosing the appellant as having both chronic bronchitis and an undiagnosed or "medically unexplained" illness, Dr. Plump's opinion would be favorable evidence in support of the appellant's claim for service connection for an undiagnosed illness.

permitted. *See Austin*, *supra; see also Hart, Mariano*, and *Rose*, all *supra.* Under these circumstances, the Board's statement of reasons or bases is inadequate. *See Mariano*, 17 Vet.App. at 312 ("VA must provide an adequate statement of reasons or bases for its decision to pursue further development where such development reasonably could be construed as obtaining additional evidence for that purpose."); *Caluza*, 7 Vet.App. at 506 (the Board's statement of the reasons or bases for its decision must "account for the evidence which it finds to be persuasive or unpersuasive, analyze the credibility and probative value" of the evidence, and "provide the reasons for its rejection of" any material evidence favorable to the appellant). The Board's rejection of Dr. Plump's December 2001 VA medical opinion, without seeking clarification or adequately explaining why such clarification was unnecessary, frustrates appellate review. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (the Board's statement of the reasons or bases for its decision "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"). Accordingly, remand is necessary.

On remand, and given the Board's view that Dr. Plump's diagnosis and opinion are inconsistent, the Board either must seek clarification of Dr. Plump's December 2001 medical opinion indicating that the appellant had an undiagnosed illness manifested by shortness of breath resulting from Persian Gulf service; or, the Board must provide a well-reasoned

statement, adequate to facilitate the Court's review, explaining its decision not to seek such clarification. The Board must further ensure that VA has complied with the notice requirements of 38 U.S.C. § 5103(a). *See Mayfield v. Nicholson*, 444 F.3d 1328, 1333 (Fed. Cir. 2006) (holding that section 5103(a) notification is not satisfied by an aggregation of pre- and postdecisional notices from which a claimant might have been able to infer what evidence VA found lacking). On remand, the appellant is free to submit additional evidence and to raise his arguments to the Board, and the Board is required to consider them. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

III. CONCLUSION

Based on the foregoing analysis and a review of the record on appeal, the Board's April 7, 2004, decision is VACATED and the appellant's claim for presumptive service connection for an undiagnosed chronic condition alleged to be the result of service in the Persian Gulf under 38 U.S.C. § 1117 is REMANDED for further proceedings consistent with this decision. The appellant's appeal as to matters finally decided in the September 1998 Board decision is DISMISSED for lack of jurisdiction.

CONCUR BY: KASOLD; HAGEL; LANCE (In Part)

DISSENT BY: HAGEL (In Part); LANCE (In Part)

DISSENT

KASOLD, *Judge*, concurring: I fully concur in the well-reasoned opinion of the Court and I write separately only to highlight the following three points:

1. The Court's Opinion Is Consistent With Our Precedent and Jurisdictional Statute.

Any suggestion that the opinion today is in some way a shift from our prior caselaw regarding finality of Board decisions – based on one theory of service connection while another theory is remanded for further adjudication – is without merit. Specifically, the Court historically has considered that a Board decision denying benefits for a disability based on one particular theory, while another theory is still being developed below, to be final for purposes of appeal and the Court's jurisdiction over an appeal. *See*, *e.g.*, *Rice v. Shinseki*, 22 Vet.App. 447 (2009) (exercising jurisdiction over an appeal of a Board decision that denied an earlier effective date for TDIU even though Board remanded the matter of an initial rating for PTSD; Court exercised its discretion to decline review of the merits and vacated the Board's decision as to TDIU because the matter was not fully developed, and remanded the matter for readjudication subsequent to adjudication of the initial rating for PTSD); *D'Aries v. Peake*, 22 Vet.App. 97 (2008) (exercising jurisdiction over appeal of Board decision that denied service connection for cause of veteran's death even while claim for DIC was denied in a separate Board decision and remanded in a separate Court decision); *Andrews v.*

West, 16 Vet.App. 384 (1999) (table) (exercising jurisdiction over appeal of Board decision denying benefits based on direct service connection while benefits based on secondary service connection were still being adjudicated).

The Court also has bifurcated a claim, affirming parts of a Board decision related to a claim for benefits while remanding for further adjudication other matters stemming from the same decision. *See*, *e.g.*, *Barringer v. Peake*, 22 Vet.App. 242 (2008) (affirming Board decision with regard to schedular ratings and effective date and remanding for adjudication of extraschedular consideration); *Palczewski v. Nicholson*, 21 Vet.App. 174 (2007) (affirming denial of service connection for hearing loss while remanding for readjudication with regard to tinnitus); *Harder v. Brown*, 5 Vet.App. 183 (1993) (affirming Board decision denying the reopening of a claim based on right-knee disability based on direct service connection, and reversing denial based on secondary service connection and remanding for further adjudication).

There are only two exceptions to our having jurisdiction over Board decisions that are final with regard to a matter, and for which notice how and when to appeal has been provided: *Harris v. Derwinski*, 1 Vet.App. 180 (1991), and *Roebuck v. Nicholson*, 20 Vet.App. 307 (2006). In *Harris*, the Court held that when the matters remanded are inextricably intertwined with another matter for which the Board denied benefits and stated its decision was final, the Court lacked jurisdiction to hear

an appeal over the matter declared final by the Board. 1 Vet.App. at 183. Today, we correctly overturn that part of *Harris* and hold that we do indeed have jurisdiction over a Board decision that denies benefits when the Board states its decision is final and that decision is timely appealed. However, the Court may, for reasons of judicial economy, nevertheless remand such a decision for adjudication with the matter still under administrative adjudication if the matters are inextricably intertwined. *Id.; see also Gurley v. Nicholson*, 20 Vet.App. 573, 576 n.3 (2007) (recognizing the dilemma a claimant faces with the question whether to timely appeal a Board decision, or risk having his right to appeal vitiated for failure to timely appeal).

The other exception is implicitly raised by *Roebuck*, which, as noted *ante* at 16, involved a unique set of circumstances such that the Court concluded that the Board decision denying a matter was not final despite the Board's decision stating it was final and the fact the claimant had been provided notice how and when to appeal. Although I concur that *Roebuck* can be distinguished from our precedential cases where the Court had jurisdiction over final Board decisions for which notice of appellate rights has been provided, it must be recognized that *Roebuck* is indeed an exception thereto. Any characterization that today's opinion establishes a new concept of finality elevates the recent single panel decision in *Roebuck*, rendered on exceptional circumstances, above the consistent understanding of this Court's

jurisdiction in the nonexceptional circumstances where the Board renders a final decision on one theory supporting a claim for benefits and remands for further adjudication that part of the claim that is based on another theory that could support an award of benefits.

2. Assertions that Evidence on Direct Service Connection Was Not Fully Developed at the Time of the 1998 Board Decision Are Speculative.

One of the concurring opinions suggests that the September 1998 Board decision that denied Mr. Tyrues's direct service-connection claim for lung disability could have been based on evidence that was not properly and fully developed; however, readers should note that this allegation is unsupported by reference to any facts; it is pure speculation. Moreover, the very suggestion of inadequate development reinforces the fact that Mr. Tyrues should have appealed the 1998 decision in a timely manner if he was not satisfied with it, so that effective appellate review could be conducted. Review of a decision rendered over 10 years ago certainly ignores the mandate from Congress that an appeal of a final Board decision be taken within 120 days of that decision. 38 U.S.C. § 7266.

3. Our Jurisdiction Is Predicated on Final Board Decisions Adversely Affecting a Claimant.

Although the Court has tried to define a "claim" for all purposes, *see Rice*, 22 Vet.App. at 451, any such effort is fruitless. Our jurisdiction is over final Board decisions affecting benefits. 38 U.S.C. §§ 7252, 7266; *see*, *e.g.*, *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000). Nothing in statute or caselaw limits our jurisdiction to final decisions on claims, or otherwise defines the context of our jurisdiction over final Board decisions on all aspects of a claim. Can it reasonably be argued that the denial of benefits for a disability based on one theory is not a final Board decision affecting benefits? A veteran might very well be entitled to benefits based on the theory denied by the Board, and to require him to wait 10 or more years to appeal that decision is wholly contrary to our statutory jurisdiction, which is the "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals" when a final decision is appealed by "a person adversely affected by such decision" within 120 days of the mailing of the decision. 38 U.S.C. §§ 7252 and 7266.

Moreover, as we recently held in *Clemons v. Shinseki*, claimants seek benefits for disabilities as they perceive them based upon particular symptoms, not based upon a particular medical term causing the perceived disability. 23 Vet.App. 1, 4 (2009). The requirement to liberally construe a claim, and the recognition that claimants generally are not competent to provide opinions as to diagnoses that require

medical training, compel the Secretary to view and develop a claim for benefits based on the reported symptoms and not just a particular, unconfirmed "diagnosis," On the other hand, the requirement to liberally construe a claim for benefits in no way constrains the Secretary from processing the claim based on different theories or diagnoses. Indeed, the Federal Circuit has held that a claim for benefits finally denied as to one medical cause, is to be treated separately from a subsequent claim for benefits based on a different medical cause, even when the disability as perceived by the veteran is the same, such as a hearing loss that is sensorineural as opposed to conductive. *Boggs v. Peake*, 520 F.3d 1330, 1337 (Fed. Cir. 2008).

Thus, a "claim" seeking benefits – i.e., a claim for benefits for whatever a veteran suffers from – is different from a "claim" denied – i.e., the denial of benefits based on one specific medical diagnosis differs from a later submitted "claim" for benefits based on a different medical diagnosis. Otherwise stated, what constitutes a "claim" differs depending on what stage in the administrative process one is attempting to define a claim – at the stage when a "claim" is filed, or at the final stage when a "claim" is denied. With regard to our jurisdiction, however, it should not be overlooked that it is premised on a final Board decision affecting benefits, and not on what constitutes a claim at any given time in the adjudication process below.

As succinctly stated in the Court's opinion, when the Board renders a final decision on a matter affecting benefits, and a claimant is provided a copy of that decision and notice how and when to appeal it, the failure to timely file an NOA precludes this Court from having jurisdiction over that decision. This is what the law states, and it is the basic holding of the Court's decision today.

HAGEL, *Judge*, concurring in the result, dissenting in part: I concur in the majority's ultimate conclusion that we do not have jurisdiction to review the September 1998 Board decision. However, I write separately because I believe that our lack of jurisdiction stems from entitlement to service connection for a chronic lung disorder being a separate and distinct claim for VA compensation from entitlement to service connection for Persian Gulf Syndrome under 38 U.S.C. § 1117. The majority chooses not to decide this issue and in doing so further confuses this Court's caselaw with the interchangeable use of the terms "issue," "matter," and "claim" without a clear definition of those terms.

Although the majority states that it is unnecessary to decide whether Mr. Tyrues has presented one claim or two, its analysis stems from the proposition that Mr. Tyrues has presented a single claim for benefits based on a lung condition. The majority regards Mr. Tyrues's joint pain, stomach pain, and memory loss symptoms as only ancillary to the lung condition. Such analysis is facilitated by the mostly interchangeable use of the terms "issue," "matter,"

and "claim" without specifically stating to what each terms refers. This lack of precision will, in my view, result in fuzzy decisions in the future, especially when used in an opinion by the full Court.

The majority's decision includes language such as, "a Board decision denying VA disability compensation on one *issue*, while another *issue* is still under adjudication." and "the Board denies benefits based on a particular *issue* with distinct criteria and remands for further adjudication another *issue* of establishing entitlement to benefits" without explaining what an "issue" is – namely whether it is a claim for benefits or theory of entitlement to benefits. *Ante* at 13 (emphasis added). The majority later refers to a potential situation where "the Board decides one *matter* and remands another *matter,*" again without explaining the meaning of "matter." *Id.* at 14 (emphasis added). By using the terms interchangeably, the majority is able to avoid using the more appropriate terms "claim" and "theory," and, thus, is able to avoid deciding the central issue raised by Mr. Tyrues on appeal and briefed by the parties – that is, whether the facts in this case define one claim or two and, if two, the effect of this Court's decision in *Roebuck*.

"Claim" has been defined by VA in 38 C.F.R. § 3.1(p) (2009), as "a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." Further, in *Roebuck v. Nicholson*, the Court adopted the definition of "claim" applied by the Federal Circuit in *Schroeder v. West*, and determined that

a claim is an application for entitlement to a VA benefit based on a current disability. *Roebuck v. Nicholson*, 20 Vet.App. 307, 312-13 (2006); *see Schroeder v. West*, 212 F.3d 1265, 1269 (Fed. Cir. 2000). The *Roebuck* Court also recognized, in line with the Court's holding in *Bingham v. Principi*, that although there may be multiple theories or means of establishing entitlement to a benefit for a disability, if the theories all pertain to the same benefit for the same disability, they constitute the same claim. *Id.* at 313; *see Bingham v. Principi*, 18 Vet.App. 470, 474 (2004) *aff'd sub nom. Bingham v. Nicholson*, 421 F.3d 1346 (Fed. Cir. 2005). The Court should therefore apply this definition of "claim" to the facts in the instant appeal. Applying that definition to the facts in this case, Mr. Tyrues has two separate claims for VA benefits. To fully explain my reasoning, it is necessary to provide a more extensive recitation of the relevant facts than is provided by the majority.

In March 1995, shortly after being hospitalized for pneumonia, Mr. Tyrues amended a prior claim for VA benefits to include entitlement to benefits for a lung disability. In support of his claim he submitted medical records that refer to both pneumonia and bronchitis. His claim for benefits for a lung disorder was initially denied. Mr. Tyrues appealed that denial to the Board.

In December 1996, Mr. Tyrues appeared at a hearing before a Board member. At this hearing, he discussed his lung condition, including coughing and congestion, which he stated was incurred in service

based on his exposure to dust, fumes, and kerosene. Mr. Tyrues stated that, since returning from the Persian Gulf, he has been diagnosed with pneumonia three or more times as well as a lung infection or a growth on his lung. After the Board member stated that he had no further questions, Mr. Tyrues's representative asked Mr. Tyrues whether he had anything to add before concluding the hearing. In response, Mr. Tyrues stated that he had been reading about symptoms that were being experienced by other soldiers who had served in the Persian Gulf and that he had noticed that he too was developing these symptoms, including soreness and aching in his joints. In response to Mr. Tyrues's description, the *Board* member stated:

> That's not really relevant now. I would advise you, there is what we call a Persian Gulf syndrome, things, now I, I would, if I were you get ahold of Mr. Weatherly here and you guys could *work up a claim* because that's an area right now which the law is changing rather rapidly and there is a distinct possibility you can get service connected for some of these things because, like I said, it, it is in the process right now of developing and *I would certainly file a claim* for it.

R. at 147 (emphasis added.) The Board member further stated that Mr. Tyrues did not currently have such a claim, but that he should file a claim based on the symptoms that he was describing. The Board member again stated: "[T]he whole process starts with you filing a claim and identifying what you feel

are the symptoms related to this and [what] the Persian Gulf syndrome symptoms are, there's a wide variety of them. . . ." *Id.* Six days later, in apparent response to the suggestion from the Board member, Mr. Tyrues submitted a statement in support of claim, stating that he wanted to amend his claim "to include aching joints, memory loss, and stomach condition caused from [his] Persian Gulf service." R. at 159.

In March 1997, the Board remanded his claim for benefits for a lung disorder back to the regional office, which sent Mr. Tyrues a letter, on March 19, 1997, notifying him that he could submit additional evidence with respect to that claim. In April 1997, VA sent Mr. Tyrues a notice letter regarding his *newly filed* "*claim* for disability benefits based on Persian Gulf War service." R. at 163 (emphasis added). The letter requested that Mr. Tyrues submit medical and non-medical evidence to support his claim. In response, Mr. Tyrues submitted lay statements from his wife, a coworker, and a fellow soldier who served with him in the Persian Gulf and who, at that time, worked with him at home. The letter from his coworker referred to Mr. Tyrues experiencing flu and cold symptoms upon returning from service. Mr. Tyrues's fellow soldier and current coworker also stated that after returning from duty, Mr. Tyrues missed work "because of flu, colds, complaints of aching joints, and soreness in his body." R. at 172. He further stated that Mr. Tyrues could not work as a result of the pain in his body. Mr. Tyrues's wife stated

that her husband experienced constant joint pain, numbness, inability to move after sleeping, flu-like symptoms, and a propensity to experience colds.

An April 4, 1997, VA Compensation and Pension Examination worksheet mentions two claims, one claim for benefits for a lung disorder being remanded from the Board and another claim for benefits for aching joints, memory loss, and a stomach condition, but notes that both claims are related to service in the Persian Gulf. In May 1997, Mr. Tyrues underwent a VA examination, which appears to relate his lung condition to his service in the Persian Gulf. The examiner also diagnosed him with "possible Gulf War Syndrome with shortness of breath, joint pain, [and] memory loss." R. at 191. Following a request by VA for authorization to obtain records, VA received records from Dr. Arnold, which stated that Mr. Tyrues experienced significant lower back pain, manifested as "a dull aching pain with intermittent sharp component on movement." R. at 212. Later records show Mr. Tyrues sought treatment for joint pain in his right shoulder, lumbar strain, flu-like symptoms, morning stiffness in his joints, generalized joint pain, coughing, and a sore throat. VA also received medical records from Dr. Mitchum, which also revealed that Mr. Tyrues experienced chronic back pain, pneumonia, and bronchitis.

On April 20, 1998, the regional office issued a Supplemental Statement of the Case, stating that it was continuing to deny entitlement to VA benefits for a lung disorder. On the same day, the regional office

issued a decision that addressed four issues: A denial of entitlement to service connection for a lung condition (noted as a remanded issue) and denial of the three other conditions, including joint pain, memory loss, and a stomach condition (noted to be new issues and all attributed to an "undiagnosed illness"). R. at 241. Mr. Tyrues, referencing the April 1998 Supplemental Statement of the Case, which denied only entitlement to VA benefits for a lung condition, appealed to the Board. Indeed, the brief submitted by his representative to the Board on appeal clearly stated that the "question at issue" on appeal was "entitlement to service connection for a lung disorder." R. at 261. In this brief, Mr. Tyrues's representative referred only to Mr. Tyrues's claim for benefits for a lung disorder and that claim's previous procedural history.

In September 1998, the Board denied service connection for a lung disorder. The Board, referring to the April 1998 rating decision, also remanded the "issue of entitlement to service connection [] for a chronic disorder manifested by shortness of breath, due to an undiagnosed illness, claimed as secondary to Persian Gulf War service." R. at 266. Although the Board discussed some of the same evidence, it referred to *two* claims, a claim for entitlement to service connection for a *lung disorder* on a direct basis and a claim for entitlement to service connection for a *chronic disorder*, due to an undiagnosed illness. With regard to the chronic disorder, the Board ordered VA

to provide Mr. Tyrues with a new medical examination, which was provided in December 1998.

In February 2000, the Board denied Mr. Tyrues's claim for benefits for "shortness of breath as a chronic disability resulting from an undiagnosed illness." R. at 313. The decision was subsequently remanded by the Court pursuant to the parties' joint motion for a remand for VA to provide Mr. Tyrues with a new medical examination. In December 2001, Mr. Tyrues underwent another VA examination, at which the examiner stated that Mr. Tyrues's "shortness of breath due to an undiagnosed illness is at least as likely as not due to the Gulf War service." R. at 350. That examiner also diagnosed Mr. Tyrues with "mild chronic bronchitis." *Id.* In July 2002, the Board's Case Development Unit found that these two diagnoses appeared to be inconsistent and ordered another examination, requesting the examiner diagnose Mr. Tyrues with a particular disorder or indicate that his symptoms were the result of an undiagnosed illness. In October 2002, a VA examiner found that Mr. Tyrues did not have any respiratory problems at that time and that any previous problems are related to allergies and not related to his Gulf War service. In April 2004, the Board denied his claim for benefits for a respiratory/ lung disorder as a chronic disability resulting from an undiagnosed illness.

These facts reveal that Mr. Tyrues was advised by a member of the *Board*, to file a *claim* for benefits for *Persian Gulf Syndrome*. Although the majority's description of this person as a "hearing officer" is not

incorrect, such a description does not convey the authority with which this statement was made. *See* 38 C.F.R. § 3.103(c)(2)(2009). Certainly a Board member understands the difference between additional symptoms of a disability for which benefits have already been claimed and a claim for benefits based upon a separate disability. The Board member specifically advised Mr. Tyrues to submit a "claim" to the agency of original jurisdiction. R. at 147. The use of such terminology by the Board serves to illustrate the problems associated with the majority's undefined use of "issue," "claim," and "matter." Further, from the time that Mr. Tyrues amended his claim in 1996 to include entitlement to VA benefits for aching joints, memory loss, and stomach condition caused by his Persian Gulf service until the Board issued its September 1998 decision remanding that claim, VA had considered, developed, and adjudicated his claims for benefits for a lung condition and for a chronic disability resulting from service in the Persian Gulf separately. Although the majority states that it need not decide the issue of whether Mr. Tyrues presented one claim or two, it must consider the claims as one in order to proceed to its discussion of *Harris* and *Roebuck*, the two issues the majority appears bound to reach. In so doing, the majority treats Mr. Tyrues as having filed a single claim for a lung disorder based on two theories of entitlement to service connection, a direct basis under 38 U.S.C. § 1110 and a presumptive basis under 38 U.S.C. § 1117. However, in doing so, the majority fails to explain why Mr. Tyrues's claim for VA benefits for a chronic disorder,

characterized by a collection of symptoms described as aching joints, memory loss, a stomach condition, and shortness of breath caused by an undiagnosed illness is part of a claim for benefits for a single lung disorder.

As stated above, when Mr. Tyrues initially described his symptoms at the December 1996 Board hearing, the Board member informed him that he needed to file a new claim for benefits for Persian Gulf syndrome, which he subsequently did. Upon receipt of his new claim, the regional office developed this claim as separate and distinct from his claim for benefits for a lung condition. The record contains a notice letter requesting that he submit evidence to support his newly filed "claim for disability benefits based on Persian Gulf War service." R. at 163. Indeed, he submitted lay statements from his wife, his coworker, and a fellow soldier and coworker, which indicated that he experienced joint and overall body pain as a result of an undiagnosed illness. Medical reports from Drs. Arnold and Mitchum confirm these symptoms. Although the September 1998 Board decision referred only to shortness of breath, it still noted that Mr. Tyrues's claim was for service connection for a chronic disorder due to an undiagnosed illness.

"A claim is an application for entitlement to a VA benefit based on a current disability." *Roebuck*, 20 Vet.App. at 312-13; *see Schroeder*, 212 F.3d at 1269. In *Roebuck*, the Court held that "although there may be multiple theories or means of establishing

entitlement to a benefit for a disability, if the theories all pertain to the same benefit for the same disability, they constitute the same claim." 20 Vet.App. at 313. In this case, Mr. Tyrues has sought benefits for two *separate disabilities:* A diagnosed lung disorder, described as both pneumonia and bronchitis, and an undiagnosed chronic condition manifested by joint pain, body ache, memory loss, and stomach conditions alleged to be the result of his service in the Persian Gulf. *Compare Boggs v. Peake*, 520 F.3d 1330, 1336 (rejecting this Court's holding that two claims based on separate and distinct diagnosed injuries can be considered the same claim if they involve the same symptomatology),[8] *with Kelly v. Nicholson*, 463 F.3d 1349, 1353 (Fed. Cir. 2006) (holding that multiple diagnoses for a single disability "were not separate claims, [but were] merely two means of establishing the same end – the service connection claim"). Here, Mr. Tyrues could establish entitlement to service connection based on either of his disabilities.

The law clearly commands the determination that Mr. Tyrues has two separate claims. Section 1117 of title 38 of the U.S. Code provides entitlement to compensation on a presumptive basis to a Persian Gulf War veteran who complains of having an undiagnosed illness or illnesses that are 10% or more disabling during the presumption period established by the Secretary. 38 U.S.C. § 1117(a)(1)(A) and (B).

[8] *See Clemons v. Shinseki*, 23 Vet.App. 1 (2009) for this Court's application of *Boggs v. Peake*, 520 F.3d at 1336.

Pursuant to section 1117(d)(2), the Secretary has promulgated 38 C.F.R. § 3.317, which provides, in pertinent part:

> (a)(1) Except as provided in paragraph (c) of this section, VA will pay compensation in accordance with chapter 11 of title 38, United States Code, to a Persian Gulf veteran who exhibits *objective indications* of a *qualifying chronic disability*, provided that such disability:
>
> > (I) Became manifest either during active military, naval or air service in the Southwest Asia theater of operations during the Persian Gulf War, or to a *degree of 10[%] or more* not later than December 31, 2006; and
> >
> > (ii) By history, physical examination, and laboratory tests *cannot be attributed to any known clinical diagnosis.*
>
> . . . .
>
> (b) For the purposes of paragraph (a)(1) of this section, signs or symptoms which may be manifestations of undiagnosed illness or medically unexplained chronic multi symptom illness include, but are not limited to:
>
> > (1) Fatigue
> >
> > (2) Signs or symptoms involving skin
> >
> > (3) Headache
> >
> > (4) Muscle pain

(5) Joint pain

(6) Neurologic signs or symptoms

(7) Neuropsychological signs or symptoms

(8) Signs or symptoms involving the respiratory system(upper or lower)

(9) Sleep disturbances

(10) Gastrointestinal signs or symptoms

(11) Cardiovascular signs or symptoms

(12) Abnormal weight loss

(13) Menstrual disorders.

38 C.F.R. § 3.317 (2008) (emphases added); *see also* 38 U.S.C. § 1117(g).

As noted by the Secretary in his brief, 38 U.S.C. § 1117 provides a unique presumption of service connection for undiagnosed illnesses incurred in, or manifested during a presumptive period following, service in the Persian Gulf. By their very nature, these claims involve undiagnosed illnesses. In this case, however, Mr. Tyrues's lung condition has been diagnosed as both pneumonia and bronchitis. He filed his original claim for a lung condition shortly after he was hospitalized for pneumonia. At the December 1998 Board hearing, Mr. Tyrues discussed his lung condition in terms of previous diagnoses of pneumonia and a lung infection. The medical records

submitted with his claim reflect these diagnoses. On the contrary, at the December 1998 Board hearing, Mr. Tyrues described symptoms including aching joints, memory loss, and stomach problems. The May 1997 medical examination specifically noted these symptoms and diagnosed him with possible Persian Gulf Syndrome with shortness of breath, joint pain, and memory loss, which could be compensable under section 1117.

Mr. Tyrues's private and VA medical records reveal that, at various times, he has sought treatment for several of the symptoms noted in § 3.317, including muscle pain, joint pain, symptoms involving the respiratory system, and gastrointestinal symptoms. These symptoms formed a basis for entitlement to service connection under 38 U.S.C. § 1117 that is distinct from Mr. Tyrues's claim for entitlement to benefits for a lung condition under 38 U.S.C. § 1110. In support of his argument that he has submitted two theories of entitlement to service connection instead of two separate claims, Mr. Tyrues cites *Schroeder*, 212 F.3d at 1270. However, in *Schroeder*, the veteran had a single diagnosed disability, an eye condition, and sought service connection for that condition on a direct basis and as a result of exposure to Agent Orange. Unlike *Schroeder*, which involved separate theories for establishing a single claim, this case involves two separate factual bases for establishing entitlement to service connection for two different disabilities. In this case, any claim for service connection for a *diagnosed* lung disorder, whether bronchitis

or pneumonia, falls outside entitlement to service connection under section 1117. Indeed, under the statute and implementing regulation, such disability "by history, physical examination, and laboratory tests *cannot be attributed to any known clinical diagnosis.*" 38 C.F.R. § 3.317(a)(1)(ii).

The facts in this case reveal that Mr. Tyrues filed two claims for VA benefits based on separate disabilities. If there are two claims and not one, then this case is easily resolved. The claim for VA benefits for a lung condition was resolved by the Board in its 1998 decision, from which Mr. Tyrues sought no appeal. This claim has, therefore, been finally resolved. Consequently, I agree with the majority that the Court does not have jurisdiction to review that claim now. 38 U.S.C. § 7266(a). However, I cannot agree with the majority's implied determination that in this case Mr. Tyrues's conditions constitute a single claim for VA benefits.[9] With respect to that matter, I respectfully dissent.

LANCE, *Judge*, with whom SCHOELEN, *Judge*, joins, concurring in part and dissenting in part: While

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[9] Because I would find that Mr. Tyrues has two separate claims, I believe that the discussion in the majority's opinion regarding whether theories of service connection may be treated separately, including its consideration of *Harris, Roebuck*, and *Joyce, all ante*, is unnecessary and, even if it was properly included in the opinion, would be obiter dictum. However, I note that the Federal Circuit's order remanding this case would have the Court consider *Roebuck* and *Joyce*.

I agree with the outcome on the theory that was addressed by the majority, I cannot agree that we lack jurisdiction over the entire claim. The majority opinion effectively overrules our decision in *Roebuck v. Nicholson*, 20 Vet.App. 307 (2006), by limiting the case to its facts. The majority does so in the name of administrative efficiency. However, I cannot agree that administrative efficiency trumps a veteran's interest in receiving the full amount of benefits that he is entitled to by virtue of his service to a grateful nation.

"An epigram widely attributed to Abraham Lincoln is appropriate in this case: How many legs does a dog have if you count his tail as a leg? Four. You can call a tail a leg if you want to, but it doesn't make it a leg." *Kuzma v. Principi*, 16 Vet.App. 140, 145 (2002) (en banc per curiam order) (Ivers, J. dissenting); *see also Arteaga v. Mukasey*, 511 F.3d 940, 946 (9th Cir. 2007) (using Lincoln's wisdom to conclude that "calling a street gang a 'social group' as meant by our humane and accommodating [asylum] law does not make it so"); *First Liberty Inv. Group v. Nicholsberg*, 145 F.3d 647, 652 (3d Cir. 1998) (applying the epigram to conclude that an employer could not escape an arbitration clause by labeling an employee as an "independent contractor"). The majority opinion holds that a Board decision is final because the Board says it is. I disagree. I believe that a Board decision does not become final until it is ripe for judicial review, regardless of the Board's desire to wash its hands of a particular theory before the claim

has been fully developed and adjudicated. *See DiCarlo v. Nicholson*, 20 Vet.App. 52, 57 (2006) (stating that finality is "a measure of procedural maturity"); *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990) (adopting "as a matter of policy the jurisdictional restrictions of the Article III case or controversy rubric"). The practical effect of the majority's holding is that a claim can be finally denied on one theory before the evidence is fully developed and VA is fully informed as to the nature of the veteran's current condition and its etiology.

It is quite reasonable to expect that, after full development of the claim, a Board decision denying a claim on one theory will be contradicted by new evidence developed on remand of a different theory. For example, a Board decision could – as happened here – deny a claim on theory A because the evidence is against it, but remand the claim for further development on theory B. If the denial of theory A is a separate decision that must be appealed immediately, then an appellant may be prejudiced if this partial denial is final. It is easy to imagine a scenario where the remand as to theory B produces a new medical opinion that actually supports theory A instead because new facts come to light, there is an advance in medical knowledge, or there is simply a disagreement of opinion by a new expert reviewing the claim. However, if theory A has already been finally denied – either because the Board decision was not appealed or because the Court affirmed that decision based on the record as it existed at the time of the Board

decision – then the appellant is now in the position of being finally denied as to both theories even though the evidence supports granting the claim as to a theory that was denied based upon an underdeveloped record. Even if the appellant realizes that the new evidence is material as to the theory that was originally denied, the effective date awarded upon reopening will be based upon the new claim rather than the original claim – potentially costing the appellant years of benefits. While such a process is administratively convenient, it is also deeply unfair.

There might be ways in which a claimant who is savvy or advised by counsel could avoid this prejudice. Perhaps the appellant could appeal the final decision as to theory A and argue that appellate review is premature until theory B is fully developed and decided because they are inextricably intertwined. However, the majority opinion holds, in essence, that alternative theories of entitlement are not presumed to be inextricably intertwined, *see ante* at 18, and the evidence showing that the theories are intertwined may not be before the Court because it is not developed until after the remand of theory B.

However, most claimants do not have attorneys at the Board level or when they file their NOAs to Board decisions. The majority decision purports to save claimants from the burden of determining whether a Board decision should be appealed by adopting a bright-line rule that Board decisions that purport to be final must always be appealed. *Ante* at 18. However, this "benefit" to claimants is actually a

mirage because it assumes that unrepresented claimants will know that the Court has adopted this bright-line rule. It is much more likely that a pro se appellant will (1) not understand that a Board decision that remands a claim as to some theories is still final as to the others; (2) accept the decision without knowledge of the evidence that will be developed on remand; or (3) appeal the denied theory on the merits even though the full record for the claim has yet to be developed. Under any framework, a premature NOA can never hurt a claimant. Only under the majority decision is a claimant penalized for not filing an NOA each time an individual theory is rejected.

The majority opinion also fails to reconcile its notion of theory-by-theory finality with the plain language of 38 U.S.C. § 5108. Section 5108 permits a claimant to reopen "a claim which has been disallowed" by submitting new and material evidence. What happens when a claimant obtains evidence that is new and material to a theory that has been finally denied before the whole claim has been denied? Would the appellant file a separate claim to reopen a claim that is still pending and being adjudicated? Similarly, 38 U.S.C. § 5110 limits the effective date for an award of benefits to the date of "the original claim" or "a claim reopened after final adjudication" to no earlier than the "date of the receipt of the application therefor." What is the effective date if theory B never becomes final before theory A is reopened and results in the grant of the claim? Section 5103(a)(1) of title 38 requires the Secretary to provide

notice of "the evidence necessary to substantiate the claim" whenever a person applies for benefits. If theory A is still being processed and a claimant wants to reopen theory B, is any notice required given that no new claim is being filed? If notice is required, does it actually apply to the whole claim, or just to the theories that were previously denied? *See Kent v. Nicholson*, 20 Vet.App. 1 (2006) (section 5103(a) notice as to an application to reopen a claim must be tailored to the basis of the prior, final denial).

The Secretary's duty to assist has also been defined by Congress in terms of claims. *See* 38 U.S.C. § 5103A. Suppose a remand of theory B for a new medical opinion produces one that "indicates" that theory A may have merit, but theory A has already been finally denied. Is 38 U.S.C. § 5103A(d) triggered? *See McLendon v. Nicholson*, 20 Vet.App. 79 (2006). On its face, the duty applies to the claim, not to the theory. If section 5103A(d) revives the previously final theory A without an application (or even any intent) to reopen, what would be the effective date and what date would be relevant for determining what law was in effect at the time the claim was filed?

Although the majority opinion fails to address any of these issues, it puts the Court on course to simply mark out every instance of the word "claim" in title 38 and pencil in "theory" in order to make the statute functional. The alternative would be for the Court to pick and choose when Congress meant "theory" when it actually wrote "claim." I find either

solution wholly unacceptable. *See Tropf v. Nicholson*, 20 Vet.App. 317, 321 n.1 (2006) ("Without standard word meanings and rules of construction, neither Congress nor the Secretary can know how to write authorities in a way that conveys their intent and no practitioner or – more importantly – veteran can rely on a statute or regulation to mean what it appears to say."); THE FEDERALIST NO. 62 (James Madison) ("It will be of little avail to the people that the laws are made by men of their own choice, if . . . no man who knows what the law is today can guess what it will be tomorrow.").

The only realistic benefit to claimants cited by the majority is that claimants may receive faster judicial review of the denied theories if claims may be denied and appealed on a piecemeal basis. *Ante* at 15. However, premature judicial review is likely to harm the appellant because the Court is prohibited from considering favorable evidence developed after the Board decision on review and may affirm the denial without benefit of the new information. *See Bonhomme v. Nicholson*, 21 Vet.App. 40, 43-45 (2007). More importantly, once the Court has gone down the track of allowing some types of interlocutory appeals in the name of faster justice, it is not apparent where the train will stop. If the Board rejects an argument concerning the duty to notify or the duty to assist, but remands for a different type of development, why should an appellant wait years before the Court gets involved? Conversely, the majority also fails to recognize that if the RO grants benefits on the second

theory on remand, then any review of the first Board decision denying the same benefit is moot. The potential for the Court to waste time on moot appeals is part of the central reason why finality should be based upon principles of ripeness rather than blind deference to the Board. Hence, the Court's decision effectively overrules *Mokal* by abandoning both ripeness and mootness as limitations on our jurisdiction. *See* 1 Vet.App. at 15.

Rather than ripeness or mootness, the majority purports to manage our theory-by-theory jurisdiction on the Board's choice to include "an 'order granting appropriate relief or denying relief.'" *Ante* at 9 (quoting 38 U.S.C. § 7104(d)). However, this standard grants the Board power to arbitrarily allow or deny claimants the ability to appeal theories by choosing whether to include such an order. For example, a Board decision may include a discussion of why the evidence does not support theory A, but remand for a new medical opinion addressing theory B. If the Board includes an order line formally denying theory A, then it must be immediately appealed. However, if it does not include such a line and remands the whole claim, then the decision is not appealable. By tying our jurisdiction to a technicality controlled by the Board, we grant the Secretary a tool to manage our jurisdiction as he sees fit. *Cf. Ribaudo v. Nicholson*, 20 Vet.App. 552 (2007) (en banc) (rejecting the argument that the Secretary has inherent authority to stay cases pending an appeal of a Court opinion to the Federal Circuit); *Marsh v. West*, 11 Vet.App. 468, 470

(1998) ("This Court has been wary of action or inaction by the B[oard] that would have had the effect of depriving this Court of jurisdiction to review a B[oard] decision over which the Court would have had jurisdiction but for the B[oard]'s action or inaction."). Alternatively, the Court will get involved in the business of determining whether a Board's discussion of a theory amounts to a formal denial regardless of the technicality.

I would also note that the majority's new concept of finality for Board decisions is inconsistent with the nature of finality at the regional office level. It is well established that RO decisions are appealed on a claim-by-claim basis by the appellant's filing a Notice of Disagreement (NOD). So long as a timely NOD is filed, an appellant is free to raise any theory of entitlement to the Board and the Board must consider all theories of entitlement raised by the record even if the theories are not raised by the claimant. *See Robinson v. Peake*, 21 Vet.App. 545, 553 (2008). Nonetheless, the majority concludes that a theory-by-theory concept of finality applies at the Board level even though claim-by-claim finality applies at the RO level. Moreover, it is not apparent how the majority opinion's concept of theory-by-theory finality can be reconciled with the Federal Circuit's decision in *Bingham v. Nicholson* that "[u]nder [38 U.S.C. § 7104(b)], finality attaches once a claim for benefits is disallowed, not when a particular theory is rejected." 421 F.3d 1346, 1348-49 (Fed. Cir. 2005).

The majority opinion asserts that applying *Roebuck* as written "creates a new exception to the rule of finality and ignores the fact that *Roebuck* explicitly was based on unique circumstances." *Ante* at 11. Nothing could be further from the truth. I read *Roebuck* as an application of well established, general principles of finality for appellate review. It has been more than 40 years since the Supreme Court explained

> The long-established rule against piecemeal appeals in federal cases and the overriding policy considerations upon which that rule is founded have been repeatedly emphasized by this Court. . . . [T]he rule as to finality "requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."

Andrews v. United States, 373 U.S. 334, 340, 83 S. Ct. 1236, 10 L. Ed. 2d 383 (1963) (quoting *Collins v. Miller*, 252 U.S. 364, 370, 40 S. Ct. 347, 64 L. Ed. 616 (1920)) (citations omitted). This concept has been widely embraced by the federal appellate courts. *See*, *e.g.*, *Garner v. U.S. West Disability Plan*, 506 F.3d 957, 960-61 (10th Cir. 2007) (holding that a district court's characterization of its order as "final" is not binding and that "courts do not ordinarily treat the burden of having to participate in [additional] litigation as one that justifies appeal from a nonfinal order"); *Dieser v. Continental Cas. Co.*, 440 F.3d 920, 923 (8th Cir. 2006) ("A final decision . . . ends the

litigation on the merits and leaves nothing for the court to do but execute the judgment." (internal quotation omitted)); *Nichols v. Cadle Co.*, 101 F.3d 1448, 1448-49 n.1 (1st Cir. 1996) (noting that certification of a pre-mature appeal "by a well-intentioned district judge can create a minefield for litigants and appellate courts alike" and holding that "a judgment is final (and, thus, appealable . . .) only if it conclusively determines all claims of all parties to the action"). Hence, I do not advocate for the creation of any type of "finality claim," but only for the application of the general rule defining when a claim is final. *Cf. DiCarlo*, 20 Vet.App. at 57 ("Finality is . . . a measure of procedural maturity. It distinguishes processes that have been completed from those that have not.").

Of course, if Congress desired to give this Court some interlocutory review power, it could certainly do so. Such authority might be narrowly tailored to rulings of law that would be appropriate for such review. *See* 38 U.S.C. § 7292(b)(1) (permitting interlocutory appeals to the Federal Circuit where "the ultimate termination of the case may be materially advanced by the immediate consideration of [the] question"). If such a change were made, then the Court might be authorized to review issues peculiarly suited to interlocutory review without jeopardizing the claimant's effective date by torturing the definition of "a final Board decision" on a claim. Accordingly, I see neither the statutory authority for the Court's ruling nor the benefit to veterans created by

encouraging piecemeal litigation. *Cf. Matthews v. Nicholson*, 19 Vet.App. 202, 206 (2005) (per curiam order) ("The Court cautions counsel against engaging in piecemeal litigation."); *Snyder v. Principi*, 16 Vet.App. 62, 69 n.3 (2002) (en banc per curiam order) (Steinberg, J., concurring) ("The Secretary should need no reminder of the Court's longstanding policy to discourage piecemeal litigation."); *Burton v. Principi*, 15 Vet.App. 276, 277 (2001) (per curiam order) ("We should not encourage the kind of piecemeal litigation in which the appellant here has engaged.").

Despite my misgivings, I would be constrained to agree with the majority if its opinion of the controlling caselaw cited compelled the outcome reached. Fortunately, it does not. Notably, the majority cites both *Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000), and *Joyce v. Nicholson*, 443 F.3d 845 (Fed. Cir. 2006), and then proceeds to ignore the plain language it quotes from those opinions. As quoted by the majority, *Maggitt* defines the finality of a Board decision in terms of "'the benefit sought by the veteran.'" *Ante* at 9 (quoting 202 F.3d at 1376). Yet, inexplicably, the majority does not further address or apply *Maggitt*. Instead of applying this clear language, the majority relies upon language from the Federal Circuit's decision in *Elkins v. Gober*, 229 F.3d 1369 (Fed. Cir. 2000), while attempting to avoid acknowledging that it ruled on the finality of different claims, not different theories. While there is much Federal Circuit caselaw noting that judicial review of one claim may

need to wait until agency adjudication of another claim is complete, it does not logically follow that individual theories of entitlement within one claim may be reviewed piecemeal.

The majority also relies on an overly broad reading of the Federal Circuit's decisions in *Grantham v. Brown*, 114 F.3d 1156, 1158-59 (Fed. Cir. 1997), and *Barrera v. Gober*, 122 F.3d 1030, 1032 (Fed. Cir. 1997). They are cited for the proposition that the Federal Circuit has blessed the concept of exercising jurisdiction over any issue where the Board purports to have rendered a final decision. Nothing could be further from the truth. The issue in both of those cases was whether the downstream elements of rating and effective date must be disputed through a new Notice of Disagreement even though one had previously been filed disputing a denial of service connection. *See Barrera*, 122 F.3d at 1031; *Grantham*, 114 F.3d at 1158. The actual holding of *Grantham* – as relied upon in *Barrera* – was that the appeal of "the logically up-stream element of service connectedness" was independent of "the logically down-stream element of compensation level." *Grantham*, 114 F.3d at 1158-59. In other words, a dispute over the service-connection element of a disability compensation claim is jurisdictionally distinct from any dispute over a disability rating and effective date that is later awarded. This makes perfect sense. There is no reason to assume that an appellant who obtains a remand after initially losing on the service-connection element will necessarily be

disappointed in the disability rating or effective date after prevailing on the service-connection element of a disability compensation claim on remand. Accordingly, it makes sense to require such an appellant to initiate a new appeal to express disagreement with the logically down-stream issues. Nothing in *Grantham's* discussion of "logically down-stream elements" supports the proposition that alternative theories for proving the same element may be appealed independently of each other.

I believe the ultimate flaw in the majority's use of Federal Circuit caselaw is that it traces back to precedent outside the claimant-friendly realm of veterans law. As the majority notes, *Elkins* relies upon *Dewey Electronics Corp. v. United States*, 803 F.2d 650 (Fed. Cir. 1986). Not only did *Dewey Electronics Corp.* involve separate claims, as clearly stated in the opinion, it involved a sophisticated corporation suing the Federal Government for a contract violation. *Id.* at 651-53. In a contract suit – as with most cases in American law – the plaintiff is responsible for gathering and presenting all the evidence to support his claim. If the plaintiff fails to do so, then he has no one to blame but himself if appellate review of the agency contracting decision is reviewed based upon an inadequate record. Veteran benefits claims are an exception to this general rule. In this area, VA owes substantial duties to assist the claimant in the development of the claim. Therefore, it is inappropriate to presume that errors that clearly prejudice the development of evidence as to one

theory of entitlement did not prejudice any other theory that may support an award of benefits. Hence, the majority opinion's analysis importing a concept of finality suited to sophisticated claimants before other agencies is fundamentally flawed. In addition, as the Federal Circuit observed in *Dewey Electronics Corp.*, "the agency's characterization of a decision is not determinative of the finality issue and the relevant statutes outlining the required administrative procedures must be examined." *Id.* at 654. In other words, even the caselaw relied upon by *Elkins* recognized that courts may reject an agency's attempt to point to a tail and call it a leg. *See also Fagre v. Peake*, 22 Vet.App. 188, 191 (2008) (per curiam order) (rejecting the Secretary's characterization of a single Board decision as multiple separate Board decisions issued together).

In summary, I do not think that administrative convenience can justify the outcome reached here or the concomitant confusion and delays that will be generated as a result. Rather, because the majority opinion ignores the plain language of title 38 and controlling Federal Circuit precedent, overrules our panel decision in *Roebuck*, and will prejudice veterans who will receive final Board decisions denying benefits based upon records that are admittedly underdeveloped, I must respectfully dissent.

[SEAL] **BOARD OF VETERANS' APPEALS**
DEPARTMENT OF VETERANS AFFAIRS
Washington, DC 20420

IN THE APPEAL OF LARRY G. TYRUES — C 26 939 429

DOCKET NO. 95-42 130) DATE APR 07 2004
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On appeal from the
Department of Veterans Affairs Regional Office
in Montgomery, Alabama

THE ISSUE

Entitlement to service connection for a respiratory/lung disorder as a chronic disability resulting from an undiagnosed illness.

REPRESENTATION

Appellant represented by: Mark R. Lippman, Attorney

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Siobhan Brogdon, Counsel

INTRODUCTION

The veteran had verified active duty service September 1969 until April 1971, and from September 1990 to May 1991. He served in the Southwest Asia Theater of operations from November 6, 1990 until April 16, 1991.

This appeal originally came before the Department of Veterans Affairs (VA) Board of Veterans' Appeals (Board) from a July 1995 rating decision of the Montgomery, Alabama Regional Office (RO) that denied service connection for a lung disorder. This issue was remanded by a decision of the Board dated in March 1997. The claim was subsequently amended to include service connection for lung disability as the result of an undiagnosed illness, which was denied by RO rating actions dated in April 1998 and February 1999.

By a decision entered in September 1998, the Board denied service connection for a lung disorder on a direct basis, and remanded the issue of entitlement to service connection for a chronic disorder manifested by shortness of breath due to an undiagnosed illness, claimed as secondary to Persian Gulf War service, for further development. The Board denied service connection for this issue in a decision dated in February 2000.

The veteran appealed the matter to the United States Court of Appeals for Veterans Claims (Court). In December 2000, the veteran's representative and the VA Office of General Counsel filed a joint motion to

vacate the prior Board determination. By Order dated in December 2000, the Court granted the joint motion, vacated the Board's February 2000 decision, and remanded the case to the Board for further action in accordance with the Order.

Thereafter, the case was remanded by decision of the Board dated in October 2001 and June 2003. Development having been completed, the case has been returned to the signatory Member for appropriate disposition.

The veteran was afforded a personal hearing on appeal in December 1996 before a Member of the Board sitting at Montgomery, Alabama; the transcript of which is of record.

FINDINGS OF FACT

1. All relevant evidence needed to adjudicate the claim of entitlement to service connection for a respiratory/lung disorder as a chronic disability resulting from an undiagnosed illness has been obtained.

2. The evidence reflects that any chronic respiratory symptoms first became manifest, several years after discharge from active duty.

3. The more probative clinical evidence of record has ascribed current respiratory symptoms to diagnosed disorders or to environmental agents.

CONCLUSION OF LAW

A lung/respiratory disorder, to include as due to an undiagnosed illness was not incurred in service. 38 U.S.C.A. §§ 1110, 1117, 5103A, 5107 (West 2002); 38 C.F.R. § 3.303, 3.317 (2003).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The veteran contends that he now has a lung and/or respiratory disorder which is of service onset, to include as the result of an undiagnosed illness resulting from service in the Persian Gulf War zone, for which service connection should be granted.

Preliminary matters: Duty-to-Assist

Initially, the Board notes that during the pendency of this appeal, the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000), was signed into law. 38 U.S.C.A. §§5100, 5102, 5103, 5103A, and 5107 (West 2002). To implement the provisions of the law, the VA promulgated regulations published at 66 Fed. Reg. 45,620 (Aug. 29, 2001) (codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2003)). The Act and implementing regulations essentially eliminate the concept of the well-grounded claim. 38 U.S.C.A. § 5107(a) (West 2002); 66 Fed. Reg. 45,620 (Aug. 29, 2001 (codified as amended at 38 C.F.R. § 3.102). They also include an enhanced duty on the part of VA to notify a claimant of the information and evidence needed to substantiate a

claim. 38 U.S.C.A. § 5103 (West 2002); 66 Fed. Reg. 45,620 (Aug. 29, 2001) (codified at 38 C.F.R. § 3.159(b) (2003)). In addition, they define the obligation of VA with respect to its duty to assist the claimant in obtaining evidence. 38 U.S.C.A. § 5103A (West 2002); 66 Fed. Reg. 45,620 (Aug. 29, 2001) (codified at 38 C.F.R. § 3.159(c) (2003)).

For the reasons explained in more detail below, the Board concludes that the passage of the VCAA and the implementing regulations do not prevent the Board from rendering a decision on this issue at this time. The Board finds that all notification and development action needed to fairly adjudicate this claim has been accomplished. As evidenced by the November 1995 statement of the case and the April 1998, February 1999, April 2002 and June 2003 supplemental statements of the case, the appellant has been furnished the pertinent laws and regulations governing the claim, and what the evidence must show in order to establish his claim. He was also informed of what evidence the VA would obtain in letters to him dated in April 1997, November 1998, November 2001 and June 2003. *See Quartuccio v. Principi*, 16 Vet. App. 183 (2002) and *Pelegrini v. Principi*, No. 01-944 (U.S. Vet. App. Jan. 13, 2004). The appellant has been afforded opportunities to submit information and evidence. The RO has made reasonable and appropriate efforts to assist the appellant in obtaining the evidence necessary to substantiate the claim currently under consideration, to include several VA examinations and a personal hearing on appeal in

December 1996. The case has been remanded on several occasions. The Board points out that in a letter from his Attorney dated in August 2001, the veteran stated that he had no additional evidence to present. The Board thus finds that all necessary development has been accomplished. Under these circumstances, it is found that that any deficiency in the notice and duty to assist requirements constitutes no more than harmless error, and that adjudication of the claim on appeal poses no risk of prejudice to the appellant. *See Bernard v. Brown*, 4 Vet. App. 384, 394 (1993).

Law and Regulations

In general, service connection is warranted where the evidence of record establishes that a particular injury or disease resulting in disability was incurred in the line of duty in the active military service. 38 U.S.C.A. §§ 1110, 1131 (West 2002); 38 C.F.R. § 3.303(a) (2003). Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service or aggravated by service. 38 C.F.R. §§ 3.303, 3.306 (2003).

For Persian Gulf veterans, service connection may be granted for objective indications of a chronic disability resulting from an illness or combination illnesses manifested by one or more signs or symptoms, to include, but not limited to, fatigue; muscle or joint pain; neurologic signs or symptoms; neuropsychologic

signs or symptoms; signs or symptoms involving the respiratory system; or sleep disturbances. The chronic disability must have become manifest either during active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of 10 percent or more not later than December 31, 2006, and must not be attributed to any known clinical diagnosis by history, physical examination, or laboratory tests. 38 U.S.C.A. § 1117; 38 C.F.R. § 3.317(a), (b) (2003).

A Persian Gulf veteran is a veteran who served on active military, naval, or air service in the Southwest Asia Theater of operations during the Persian Gulf War. 38 U.S.C.A. § 1117(e) (West 2002); 38 C.F.R. § 3.317(d) (2003).

Factual Background

The veteran's service medical records from a period of active duty between 1969 and 1971 reflect that he was treated for an upper respiratory infection in August 1970, and was hospitalized with flu syndrome in January 1971. Upon examination in April 1971 for discharge from active duty, the lungs and chest were evaluated as normal. Upon service discharge examination in April 1991, the veteran complained sinusitis/hay fever and said that he smoked cigarettes.

The appellant underwent a VA general medical examination in June 1991 for a claim not pertinent to this appeal. Examination of the respiratory system revealed normal and clear breath sounds, bilaterally,

with no wheezes. The chest was normal to auscultation.

Private clinical records dated between March and October 1994 reflect that the appellant sought treatment for complaints of a recurring and productive cough. A diagnosis of early pneumonia was rendered in October 1994. It was noted that the veteran worked in fumes and that he used to work in dust. A chest X-ray showed hilar prominence and infiltrate of both lung bases.

Upon personal hearing on appeal in December 1996, the veteran stated that he did not have any respiratory problem before serving in the Gulf War zone. He said that during the five months he was there, he was exposed to considerable dust and fumes, and that when he came back, he began to have recurring episodes of pneumonia, and was hospitalized for a week with a lung infection. The appellant stated that he had a chronic urge to cough and felt something draining into his throat.

In a statement dated in April 1997, the veteran's wife said that he had flu-like symptoms and more colds, and felt bad all of the time. A former fellow soldier and a co-worker attested to similar symptoms the veteran experienced.

The veteran was afforded a VA general medical examination in May 1997 and stated that he worked in food rations breakdown while stationed in the Persian Gulf War zone. He related that he worked in Saudi Arabia and Iraq but did not recall

any significant smoke although there was heavy dust in his area, as well as an ammunition dump. He said that upon his return, he began noticing some changes in his lung status, to include coughing up yellow phlegm daily. He stated that shortly after his return, he passed out at home and was hospitalized for one week. The appellant related that he was told that he had pneumonia, and that fluid collected in his lungs. It was noted that he had no shortness of breath at rest, and could walk, but became dyspneic going up two flights of stairs. He said he did not cough much any more and did not have chest pain.

Upon physical examination of the respiratory system, there was no sign of cough or expectoration. He had full and symmetrical excursion of the diaphragms. The lungs were clear to auscultation. There was no wheezing. Following examination, a pertinent diagnosis of possible Persian Gulf Syndrome with shortness of breath, joint pain and memory loss was rendered. The examiner commented that "[i]t is only speculation on my part, but he did not have a lung disorder prior to his service in the Persian Gulf as he does now . . . I do not find any evidence of pre-existing lung disorder prior to his Persian Gulf Service."

Subsequently received were private clinical records from D. H. Arnold, M.D., dated in February 1996 which show that the appellant was seen with complaints that included a sore throat, sinus drainage, a stuffy head, a cough with some production and nausea diagnosed as acute pharyngitis. Medical records were received from O. D. Mitchum, M.D., reflecting

that the veteran was seen in March 1994 for what was felt to be symptoms of severe bronchitis. It was noted that he had also had tonsillitis. The appellant was placed on medication but continued to have some cough, rawness in the throat and low-grade fever. He subsequently sought emergency room treatment and was found to have an infiltrate in his left lung and was admitted for additional treatment. The veteran was diagnosed with a case of refractory pneumonia for which he was placed on medication. Approximately four days later, a chest X-ray disclosed interval improvement with partial clearing of the left upper lobe pneumonia. In March 1997, an X-ray of the chest revealed a normal study.

The veteran underwent a VA respiratory examination in December 1998. It was noted that the claims folder was reviewed. The examiner recited the appellant's pertinent background history, to include complaints of a lung problem characterized by episodes or respiratory infections since 1990, after returning from service in the Persian Gulf War zone. The examiner noted that in June 1991, following release from active duty, the veteran had not claimed a lung disorder, had been examined and was found to have a normal chest X-ray with normal respiratory findings. Medical history relating to episodes of refractory pneumonia in March 1994, as well as follow-up for lung symptoms in October 1994 was recited. It was reported that a chest X-ray in October 1994 was interpreted as showing a hilar prominence on the left and questionable infiltrate in both bases. It was noted, however,

that a subsequent X-ray at Wireglass Hospital had revealed a normal study. The examiner also related that upon VA examination in May 1997, a chest X-ray and pulmonary function studies were normal.

The veteran's current symptoms were reported to be shortness of breath, tightness, and a tingling sensation n the chest, coughing and susceptibility to colds. It was noted that he had not been using any kind of medication for his breathing when his sinuses were symptomatic. The veteran stated that such symptoms occurred especially when he was in a dusty area, along with an itching sensation in the substernal area. He reported expectoration at times, as well as some loss of appetite. The appellant related that he had shortness of breath after walking ¼ of a mile and said he had 'no energy.' He said that he had never been on oxygen, but that he had used nebulizer treatments and an inhaler in the past. He related that while in the military, he was exposed to dust and trucks, was located in an area near an ammunition dump. He denied a history of exposure to oil fire smoke. He said that he smoked occasionally.

On physical examination, the veteran was observed to be in no distress. No dyspnea was noted at rest or with minimal exertion. The heart revealed normal S1 and S2 regular rhythm. There were slightly decreased breath sounds in the lung bases with questionable rale, on the left slightly more than the right. Examination of the extremities showed no peripheral edema, cyanosis or clubbing. A chest X-ray was interpreted as indicating no acute infiltrate. Pulmonary

function studies were performed. Following examination, diagnoses of chronic bronchitis with symptoms getting worse when exposed to dust, paint, etc., and status post treatment for refractory pneumonia in March 1994, were rendered. The examiner commented that after history obtained from the veteran, review of the claims folder, and the examination findings, it appeared that the veteran had chronic bronchitis which became worse with exposure to dust and paint, etc. It was added that from his private physician's records, respiratory problems and symptoms were first manifested in approximately the early part of 1994, as evidenced by his visits to private physicians around that time. It was noted that it did not appear that he had sought any treatment for respiratory problems prior to that time.

Pursuant to Board remand to October 2001, the appellant underwent additional VA examination in December 2001. It was noted that the claims folder was reviewed. The veteran again indicated that he had had shortness of breath since his return from Saudi Arabia in 1991. He stated that he was exposed to dust, fumes and kerosene during the Gulf War. The appellant related that he had intermittent tightness in the chest, chest pain, and pain that radiated down the arm with an occasional sore throat. He described productive coughing, low-grade fever, with associated weakness, tiredness, and some headaches and dizziness. He said that a private physician was currently treating him, and that a chest X-ray had revealed a spot on his lungs.

On physical examination, there were decreased breath sounds bilaterally on auscultation of the chest, but no wheezes, rales or rhonchi were noted. There were no changes consistent with pulmonary hypertension, cor pulmonale or congestive heart failure. A chest X-ray revealed changes consistent with mild chronic bronchitis. Pulmonary function studies were performed and were interpreted as showing a high diffusion capacity which was felt to be consistent with asthma, or high pulmonary flow status versus spurious results. Following examination, diagnoses of mild chronic bronchitis, diffusion capacity and spirometry within normal limits, and refractory pneumonia, March 1994, were rendered. The examiner opined that the veteran's "shortness of breath due to an undiagnosed illness was at least as likely as not due to the Gulf War service." It was added that the examiner was unable to render an opinion as to the etiological basis of the disorder and its date of onset.

The veteran underwent further VA examination in October 2002 pursuant to Board development. The claims folder was reviewed and pertinent medical history previously recorded was recited. It was reported that the veteran denied shortness of breath, pressure in the chest or cough at that time, but that he had such symptoms when exposed to vapors and paint, but not on exertion. He denied the use of inhalers or medication for shortness of breath.

On physical examination, the lungs were clear. It was reported that pulmonary function studies were within normal limits with an insignificant response to

bronchodialator. A chest X-ray showed clear lungs. The examiner performed a thorough review of previous diagnostic findings of record pertaining to the chest and lungs since discharge from service. It was found that there were no respiratory problems, symptoms or signs at that time. It was the examiner's opinion that the veteran was allergic to certain paints and vapors, and that his occasional respiratory symptoms were not related to exposure to fumes during the Gulf War.

Legal Analysis

At the outset, the Board points out that although the veteran sought treatment for an upper respiratory infection and was hospitalized for the flu during his first period of service, there is no indication that such symptoms developed into a chronic disorder. *See* 38 C.F.R. § 303. Although he now states and has presented testimony to that effect that he began to display symptoms of respiratory distress immediately after his departure from the Gulf, the available evidence does not support these contentions. On VA compensation examination in June 1991, no lung or respiratory complaints were noted or found. The first evidence of any significant condition affecting the lungs/respiratory system is shown when he was seen for a recurring cough in 1994. Thus, due to lapse of time, continuity of any in-service symptomatology may not be conceded, and service connection for a lung/respiratory disorder may not be granted on a direct basis. *See* 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303.

After a thorough review of the record, the Board finds that the more probative clinical evidence of record has attributed the veteran's respiratory and/or lung symptoms to known clinical problems over the years, to include pneumonia, pharyngitis, tonsillitis, bronchitis and a reaction to inhaling environmental agents. The latter conclusion was specifically propounded as the likely cause of his intermittent respiratory problems when the VA examined the veteran in December 1998 and October 2002. It is also significant to point out that when he was being treated by his private physician in October 1994, it was specifically recorded that the appellant currently worked in fumes, and that he had previously worked in a dusty atmosphere.

The Board observes that there also exists evidence of record to contradict the cited VA medical conclusions. On VA general medical examination in May 1997, a diagnosis of possible Persian Gulf Syndrome with shortness of breath was rendered. It appears in this instance, however, that an assumption was made by the examiner that because there was no evidence of a lung disorder prior to service in the Persian Gulf theater, the veteran likely had such disability as the result of such service. That examiner clearly indicated, however, that this opinion was based on speculation. The Board notes that the U.S. Court of Appeals for Veterans Claims (Court) has held that a medical opinion based on speculation, without supporting clinical data or other rationale, does not provide the required degree of medical certainty. *Bloom v. West*,

12 Vet.App. 185, 187 (1999). A bare conclusion, even one reached by a medical professional, is not probative without a factual predicate in the record. *Miller v. West*, 11 Vet. App. 345, 348 (1998). When examined by the VA in December 2001, the examiner opined that the veteran's "shortness of breath due to an undiagnosed illness was at least as likely as not due to the Gulf War service." It was added that an opinion as to the etiological basis of the disorder and its date of onset could not be provided. The Board points out in this case, however, that despite the finding of an undiagnosed illness relating to respiratory symptomatology, it is noteworthy that the examiner did indeed offer a specific diagnosis of mild chronic bronchitis. A diagnosis of both an undiagnosed illness and a diagnosed condition pertaining to the same symptoms is inconsistent with the governing regulation in this regard. As noted above, the application of 38 U.S.C.A. § 1117 has an explicit condition that this particular type of claim be based on a "chronic disability *resulting from an undiagnosed illness*." 38 U.S.C.A. § 1117(a) (emphasis added); *see also* 38 C.F.R. § 3.317(a)(1)(ii). Therefore, because the veteran's lung/respiratory problems have been etiologically related to discernable clinical causes, in this case, pneumonia, pharyngitis, chronic bronchitis, tonsillitis, and inhaling of environmental agents, rather than to an undiagnosed illness, the provisions of 38 U.S.C.A. § 1117 and 38 C.F.R. § 3.317 are not applicable. Accordingly, the Board finds that the veteran's claim of service connection for a respiratory/lung disorder as a chronic disability resulting from an

undiagnosed illness is legally insufficient under 38 U.S.C.A. § 1117 and 38 C.F.R. § 3.317, and must be denied. *See Neumann v. West*, 14 Vet. App. 12, 22 (2000), *vacated on other grounds, (per curiam order)*; *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994).

The Board has also considered the doctrine of benefit of the doubt as to the issue on appeal, but finds that the record does not provide an approximate balance of negative and positive evidence on the merits. Therefore, a reasonable basis for a grant of the benefit sought on appeal is not identified at this time.

ORDER

Service connection for a lung/respiratory disorder as a chronic disability resulting from an undiagnosed illness is denied.

/s/ Lawrence M. Sullivan
LAWRENCE M. SULLIVAN
Veterans Law Judge, Board of Veterans' Appeals

[SEAL] **BOARD OF VETERANS' APPEALS**
DEPARTMENT OF VETERANS AFFAIRS
Washington, DC 20420

IN THE APPEAL OF LARRY G. TYRUES C 26 939 429

DOCKET NO. 95-42 130) DATE SEP 29 1998
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On appeal from the
Department of Veterans Affairs Regional Office
in Montgomery, Alabama

THE ISSUE

Entitlement to service connection for a lung disorder, including service connection for a chronic disorder manifested by shortness of breath due to an undiagnosed illness, claimed as secondary to Persian Gulf War service.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR BOARD

Patricia A. Dowdell, Counsel

INTRODUCTION

The veteran served on active duty from September 1969 to April 1971, and from September 1990 to May 1991.

This matter came before the Board of Veterans' Appeals (hereinafter the Board) on appeal from a July 1995 rating decision from the Montgomery, Alabama, Regional Office (RO), which denied service connection for a lung disorder.

The veteran was afforded a personal hearing before a member of the Board sitting at the Montgomery, Alabama, RO in December 1996. The member of the Board who held the hearing is making the decision in this case and is the signatory to this decision.

In March 1997, the Board remanded this appeal to the RO to obtain the names and addresses of all medical care providers who have treated the veteran for any lung disorder; and to schedule the veteran for a VA respiratory examination.

By a rating action dated in April 1998, the RO, in pertinent part, denied service connection for a chronic disorder manifested by shortness of breath, due to an undiagnosed illness, claimed as secondary to Persian Gulf War service.

The issue of entitlement to service connection for service connection for a chronic disorder manifested by shortness of breath, due to an undiagnosed illness, claimed as secondary to Persian Gulf War service, is the subject of the remand portion of this decision.

CONTENTIONS OF APPELLANT ON APPEAL

The veteran contends, in essence, that he has a lung disorder as a result of his active service. He reports that he did not have any problems with a frequent cough, cold or lung problems prior to service; that he was treated for pneumonia after service; that he was hospitalized for a lung infection; and that a private physician told him that he had a lymph node. He also reports that has continued to have lung problems since active service.

DECISION OF THE BOARD

The Board, in accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991 & Supp. 1998), has reviewed and considered all of the evidence and material of record in the veteran's claims file. Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of the Board that the veteran has not met the initial burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that his claim for entitlement to service connection for a lung disorder on a direct basis is well-grounded.

FINDING OF FACT

There is no competent medical evidence linking the veteran's current lung disorder on a direct basis to service.

CONCLUSION OF LAW

The claim for entitlement to service connection for a lung disorder on a direct basis is not well-grounded. 38 U.S.C.A. § 5107 (West 1991).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The threshold question that must be resolved with regard to a claim is whether the veteran has met his initial obligation of submitting evidence of a well-grounded claim. *See* 38 U.S.C.A. § 5107(a); *Murphy v. Derwinski,* 1 Vet.App. 78 (1990). A well-grounded claim is a plausible claim that is meritorious on its own or capable of substantiation. *See Murphy,* 1 Vet.App. at 81. An allegation that a disorder should be service connected is not sufficient; the veteran must submit evidence in support of a claim that would justify a belief by a fair and impartial individual that the claim is plausible. *See* 38 U.S.C.A. § 5107(a); *Tirpak v. Derwinski,* 2 Vet.App. 609, 611 (1992). The quality and quantity of the evidence required to meet this statutory burden of necessity will depend upon the issue presented by the claim, *Grottveit v. Brown,* 5 Vet.App. 91, 92-93 (1993).

The three elements of a "well grounded" claim for service connection are: (1) evidence of a current disability as provided by a medical diagnosis; (2) evidence of incurrence or aggravation of a disease or injury in service as provided by either lay or medical evidence, as the situation dictates; and, (3) a nexus,

or link, between the inservice disease or injury and the current disability as provided by competent medical evidence. *See Caluza v. Brown,* 7 Vet.App. 498, 506 (1995); *see also* 38 U.S.C.A. § 1110 (West 1991); 38 C.F.R. § 3.303 (1996). This means that there must be evidence of disease or injury during service, a current disability, and a link between the two. Further, the evidence must be competent. That is, an injury during service may be verified by medical or lay witness statements; however, the presence of a current disability requires a medical diagnosis; and, where an opinion is used to link the current disorder to a cause during service or a service-connected disability, a competent opinion of a medical professional is required. *See Caluza* at 504; *Reiber v. Brown,* 7 Vet.App. 513 (1995).

Service connection may be established for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury or disease in line of duty. 38 U.S.C.A. §§ 1110, 1131. Regulations also provide that service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

The service medical records for the veteran's first and second periods of active service do not show complaints or findings of any lung disorder.

The report of the initial post service VA general medical examination conducted in June 1991 does not show that the veteran given a diagnosis relative to a lung disorder, or that there were findings otherwise pertinent to the presence of such conditions. Additionally, according to the report of a VA general medical examination, the examiner noted that breath sounds were clear and normal bilaterally; that there was no evidence of any wheezes; and that the chest was normal to percussion. Moreover, X-rays of the chest, associated with the June 1991 VA general medical examination, were indicated to have been essentially normal. There was no evidence of any active pulmonary or pleural abnormality.

The veteran's post service clinical records do not document complaints or findings referable to a lung disorder until 1994. Specifically, there is no treatment for any problems associated with a lung disorder that is documented between 1991 and 1994. A summary of private hospitalization dated in March 1994 included a diagnosis pneumonia of the left lung. Private X-rays of the chest dated on March 23, 1994 showed interval improvement with partial clearing of the left upper lobe pneumonia. Private X-rays of the chest dated on March 27, 1994 showed an infiltrate on the left. Private X-rays of the chest dated in October 1994 revealed hilar prominence on the left with questionable infiltrate of both spaces.

The veteran testified before a member of the Board at the RO in December 1996 that he has a lung disorder

as a result of his active service in support of Operation Dessert Shield/Storm during the Persian Gulf War. He stated that he did not have any problems with a frequent cough, cold or lung problems prior to service. He also stated that he was treated for pneumonia after service; that he was hospitalized for a lung infection; and that a private physician told him that he had a lymph node. He further stated that has continued to have lung problems since active service.

A statement from I. Williams dated in April 1997 stated that he served with the veteran in Desert Storm and Shield and that he also worked with the veteran for the same employer as a civilian. Mr. Williams stated, in pertinent part, that the veteran lost numerous days because of the flu and colds.

A statement from C. Cotton dated in April 1997 stated that he worked with the veteran for several years prior to his call-up active duty in Saudia Arabia. Mr. Cotton reported that the veteran often seemed to complain about not feeling good after he returned to work and that the veteran seemed to have colds and flu-like symptoms quite often. Mr. Carter indicated that he did not remember the veteran having these problems prior to his active duty service in Sandia Arabia.

A statement from L. Tyrues, the veteran's wife, dated April 1997 stated that the veteran was a different person after he came from overseas service. The veteran's wife reported that the veteran had more

flu-like problems; that the veteran catches many colds; and that the veteran feels bad all the time.

Pursuant to the Board's May 1997 Remand decision, the veteran was administered a VA general medical examination in May 1997. According to the report of a VA general medical examination, the examiner concluded that it was only speculation on his part, but the veteran "did not have a lung disorder prior to his service in the Persian Gulf as he does now." The examiner also concluded that there was no evidence of any pre-existing lung disorder prior to his Persian Gulf service. Additionally, X-rays of the chest, associated with the May 1997 VA general medical examination, were indicated to have been essentially normal. Moreover, pulmonary function studies, associated with the May 1997 VA general medical examination, were indicated to have been within normal limits.

Where the determinative issue involves a question of medical diagnosis or medical causation, competent medical evidence to the effect that the claim is plausible or possible is required to establish a well-grounded claim. *Grottveit v. Brown,* 5 Vet.App. 91, 93 (1993). Lay assertions of medical causation, or substantiating a current diagnosis, cannot constitute evidence to render a claim well grounded under 38 U.S.C.A. § 5107(a); if no cognizable evidence is submitted to support a claim, the claim cannot be well grounded. *Id.* The veteran's sworn testimony and the lay statements in this regard would be of minimal, if any, probative value as they are not shown to be possessed of the medical credentials requisite to

offering a competent medical opinion as to causation and/or diagnosis. *Espiritu v. Derwinki,* 2 Vet.App. 492, 495 (1992).

In this case, there is no competent evidence that the veteran currently suffers from a lung disorder on a direct basis, which can reasonably be related to the veteran's periods of active service. Furthermore, no competent medical professional has furnished evidence supportive of the veteran's allegations that a lung disorder on a direct basis has any relationship to his period of active service.

Consequently, in the absence of any competent evidence linking a current disability to service, the claim is not well-grounded. *Caluza.* Accordingly, there is no duty to assist the veteran in any further development of his claim. *Rabideau v. Derwinski,* 2 Vet.App. 141 (1992), *Murphy v. Derwinski,* 1 Vet.App. 78 (1990). Further, the Board views the information provided in the statement of the case, supplemental statement of the case, and other correspondence from the RO, sufficient to inform the veteran of the elements necessary to complete his application for service connection for a lung disorder on a direct basis. Moreover, the veteran has not put the VA on notice of the existence of any specific, particular piece of evidence that, if obtained, might make the claim well-grounded. *Robinette v. Brown,* 8 Vet.App. 69 (1995).

Although the RO did not specifically state that it denied the veteran's claim on the basis that it was not well grounded, the Board concludes that this was not

prejudicial to the veteran. *See Edenfield v. Brown,* 8 Vet.App 384 (1995) (*en banc*) (when the Board decision disallowed a claim on the merits where the Court finds the claim to be not well grounded, the appropriate remedy is to affirm, rather than vacate, the Board's decision, on the basis of nonprejudicial error). The Board, therefore, concludes that denying the appeal on this issue because the claim is not well grounded is not prejudicial to the veteran. *See Bernard v. Brown,* 4 Vet.App. 384 (1993).

ORDER

The claim for entitlement to service connection for a lung disorder on a direct basis is denied.

REMAND

After a review of the record, it is the opinion of the Board that additional development of the evidence should be accomplished prior to further consideration of the veteran's claim of entitlement to service connection for a chronic disorder manifested by shortness of breath, due to an undiagnosed illness, claimed as secondary to Persian Gulf War service.

38 C.F.R. § 3.317 (1997) authorizes the Secretary of VA to compensate a Persian Gulf veteran who exhibits objective indications of chronic disability resulting from an illness or combination of illnesses manifested by one or more signs or symptoms, including but not limited to signs or symptoms involving several bodily

systems to include the respiratory system. However, compensation shall not be paid if there is affirmative evidence that an undiagnosed illness was not incurred during active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War, or an undiagnosed illness was caused by a supervening condition or event that occurred between the veteran's most recent departure from active duty in the Southwest Asia theater of operations during the Persian Gulf War and the onset of the illness, or the illness is the result of the veteran's own willful misconduct or the abuse of alcohol or drugs.

Although the regulation contains a two year presumptive period (beginning after the date on which the veteran last performed service in the Southwest Asia theater of operations during the Persian Gulf War) for an undiagnosed illness or combination of undiagnosed illnesses that become manifest to a compensable degree during that period, the Board notes the regulation was amended by final rule in March 1998 to extend the presumptive period for such undiagnosed illnesses that become manifest through the year 2001. 63 Fed.Reg. 44, 11122-23, (1998) (to be codified at 38 C.F.R. § 3.317).

VBA Circular 20-92-29(10/11/94), which pertains to processing of claims based on exposure to environmental agents in the Persian Gulf War and claims from undiagnosed illness, was revised effective July 2, 1997.

As the record stands, it is unclear whether there is medical evidence to support the veteran's claimed respiratory symptoms or whether any of the symptoms are affiliated with a diagnosed illness. Accordingly, because it is not the function of the Board to make medical determinations, *see Colvin v. Derwinski,* 1 Vet. App. 171 (1991), this claim is remanded to the RO so that an examination can be scheduled, and the above information can be requested from the examiner. The Board notes that if a specialist examination is appropriate to rule out known diagnoses, such examination, i.e. respiratory, should be scheduled. *See Veteran's Benefits Administration,* (VBA) Circular 20-92-29 (July 2, 1997).

To ensure that the VA has met its duty to assist the claimant in developing the facts pertinent to the claim and to ensure full compliance with due process requirements, the case is REMANDED to the RO for the following development:

1. The RO should send the veteran the development letter as set forth in VBA Circular 20-92-29 (July 2, 1997).

2. The RO should also furnish the veteran the appropriate release of information forms in order to obtain copies of all VA, private and military medical records pertaining to treatment of shortness of breath, due to an undiagnosed illness, claimed as secondary to Persian Gulf War service, since his release from active duty to the present.

3. The RO should schedule the veteran for a VA Persian Gulf examination for shortness of breath, due to an undiagnosed illness, claimed as secondary to Persian Gulf War service. *The RO should also inform the veteran of the consequences of failing to report for the scheduled examination.* It is very important that the examiner be afforded an opportunity to review the veteran's claims file prior to the examination. The examiner(s) should be requested to *address each of the veteran's alleged signs or symptoms individually,* providing an opinion as to *whether or not there are any clinical, objective indications of these alleged symptoms.* If such objective evidence is present, the examiner should provide a description of the evidence or indications, Furthermore, *for each and every symptoms alleged by the veteran, the examiner should provide an opinion as to whether the symptom is attributable to a "known" clinical diagnosis, in light of the medical history and examination findings.* If so, *the examiner should identify the diagnosed disorder, explain the basis for the diagnosis, and render an opinion as to the etiological basis of the diagnosed disorder and its date of onset.* All indicated special studies should be accomplished and the findings then reported in detail. If specialist examinations are appropriate to rule out known diagnoses, such examination(s), i.e., respiratory, should be scheduled. VBA Circular 20-92-29 (July 2, 1997). *The claims folder, a copy of 38 C.F.R. § 3.317, and a copy of this*

REMAND shall be made available to the he examiner(s) prior to the examination.

4. After the development requested above has been completed to the extent possible, the RO should readjudicate the issue in appellate status, to include consideration of *38 C.F.R. § 3.317 (1997).*

If the benefit sought on appeal remains denied, the veteran and his representative should be furnished a supplemental statement of the case and an opportunity to respond. Thereafter, the case should be returned to the Board, if in order.

This claim *must be afforded expeditious treatment* by the RO. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Veterans Appeals for additional development or other appropriate action must be handled in an expeditious manner. *See* The Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 302, 108 Stat. 4645, 4658 (1994), 38 U.S.C.A. § 5101 (West Supp. 1998) (Historical and Statutory Notes). In addition, VBA's ADJUDICATION PROCEDURE MANUAL, M21-1, Part IV, directs the ROs to provide expeditious handling of all cases that have been remanded by the Board and the Court. *See* M21-1, Part IV, paras. 8.44-8.45 and 38.02-38.03.

/s/ Lawrence M. Sullivan
LAWRENCE M. SULLIVAN
Member, Board of Veterans' Appeals

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991 & Supp. 1998), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). The date that appears on the face of this decision constitutes the date of mailing and the copy of this decision that you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals. Appellate rights do not attach to those issues addressed in the remand portion of the Board's decision, because a remand is in the nature of a preliminary order and does not constitute a decision of the Board on the merits of your appeal. 38 C.F.R. § 20.1100(b) (1997).
