2017-1821

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ALFRED PROCOPIO, JR.,
Claimant-Appellant,

v.

PETER O'ROURKE,
ACTING SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

Appeal from the United States Court Of Appeals for Veterans Claims in No. 15-4082, Judge Coral W. Pietsch

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RESPONDENT-APPELLEE'S SUPPLEMENTAL BRIEF

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Acting Secretary of Veterans Affairs,
Respondent-Appellee.

RESPONDENT-APPELLEE'S SUPPLEMENTAL BRIEF

Pursuant to the Court's order dated May 21, 2018, respondent-appellee, the Acting Secretary of Veterans Affairs (VA), respectfully submits this supplemental brief to address the impact of the pro-claimant canon on this Court's analysis under *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984).

ISSUE PRESENTED

What is the impact of the pro-claimant canon on step one of the *Chevron* analysis in this case, assuming that *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), *reh'g denied*, 544 F.3d 1306 (Fed. Cir. 2008), did not consider its impact?

ARGUMENT

Pursuant to the principles underlying *Chevron* and this Court's precedent, the pro-claimant canon should play no role in this Court's analysis of 38 U.S.C. § 1116 at step one of its *Chevron* analysis.[1]

I. The Principle Of Resolving Interpretive Doubt In A Veterans Benefits Statute In A Claimant's Favor Is Incompatible With The Inquiry At *Chevron* Step One

Under *Chevron* step one, when "the intent of Congress is clear, that is the end of the matter[.]" 467 U.S. at 843. "If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id.*; *id.* at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation by the administrator of an agency."). "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* At this second step of the *Chevron* analysis, courts defer to an administrative agency's statutory construction when, as here, "Congress has authorized the administrative agency 'to

[1] Although we refer to the pro-veteran doctrine arising from cases such as *Brown v. Gardner*, 513 U.S. 115 (1994), as the "pro-claimant canon" to avoid confusion, for the reasons discussed below, we believe it is best referred to as a doctrine, and not a canon.

engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.'" *Cathedral Candle Co. v. U.S. Intern. Trade Comm'n*, 400 F.3d 1352, 1363 (Fed. Cir. 2005) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2002)).[2]

Chevron is clear – this Court's analysis at step one is limited to determining whether the intent of Congress is clear. If it is not, this Court must proceed to step two and defer to VA's reasonable interpretation. Although courts may "employ[] traditional tools of statutory construction" at *Chevron* step one, *see Chevron*, 467 U.S. 843 n.9, this Court has never endorsed resolving interpretive doubt in a veterans benefit statute in a veteran's favor as a means of determining whether Congress's intent is clear. *See, e.g., Paralyzed Vet. Of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1340, 1358 (Fed. Cir. 2003) (noting the principle of resolving interpretive doubt in a claimant's favor, but deferring to VA's construction of numerous undefined statutory terms); *see I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("The Court first implies that courts may substitute their interpretation of a statute for that of an

[2] The VA has "authority to prescribe all rules and regulations which are necessary and appropriate to carry out the laws administered by the Department and are consistent with those laws[.]" 38 U.S.C. § 501(a); *see Gilpin v. West*, 155 F.3d 1353, 1356 n.2 (Fed. Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999) ("It is beyond question that the Secretary has substantive rule-making power with respect to the benefits in question here and thus *Chevron* deference applies.").

agency whenever, '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of the statute. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*.").

Indeed, the very premise of the pro-claimant canon – that *interpretive doubt* is to be resolved in the veteran's favor – is incompatible with the Court's inquiry at *Chevron* step one, which looks to whether Congress's intent is clear from the statute. There can be no interpretive doubt in need of resolution if Congress's intent is clear from the statute. Thus, where there is interpretive doubt in a veterans benefit statute in need of resolution – because the statute is ambiguous or silent on the issue – *Chevron* instructs that the court's step one analysis is at an end, and the court must proceed to *Chevron* step two.

This Court's veterans benefits precedent is firm on this point – resolving interpretive doubt in a veterans benefit statute in the veteran's favor at *Chevron* step one is error. *See Heino v. Shinskei*, 683 F.3d 1372, 1379 n.8 (Fed. Cir. 2012) ("Regardless, Mr. Heino asks this court to resolve 'interpretive doubt' in his favor by holding that there is no doubt as to what 'the cost to the Secretary' could mean. However, we will not hold a statute unambiguous by resorting to a tool of statutory construction used to analyze ambiguous statutes."). In *Gallegos v. Gober*, 14 Vet.

App. 50 (2000), the Veterans Court applied the pro-claimant canon at *Chevron* step one, never reaching *Chevron* step two or VA's regulation, because it held that "even were we to find some ambiguity in the statute, which we do not, we would be compelled to resolve 'interpretive doubt . . . in the veteran's favor.'" *Gallegos*, 14 Vet. App. at 56. This Court reversed, holding that unless Congress has "*directly*" addressed the "*precise* question under review," it is error to resolve the question using the pro-claimant canon at *Chevron* step one. *Gallegos v. Principi*, 283 F.3d 1309, 1313 (Fed. Cir. 2002). Instead, according to *Chevron*, such a statute contains "a gap for *an agency* to fill[,]" and the Court must review and defer to the agency's reasonable gap-filling regulation at step two. *Id.* (citing *Chevron*, 467 U.S. at 843) (emphasis added). The *Gallegos* Court thus performed a *Chevron* step two analysis and made clear that "in reaching" the conclusion that "§ 20.201 is not procedurally defective, arbitrary or capricious in substance, or manifestly contrary to § 7105 or any other relevant statute . . . this court has considered as well the pro-claimant nature of the veteran adjudication system." *Id.* (emphasis added); *see also Guerra v. Shinseki*, 642 F.3d 1046, 1051-52 (Fed. Cir. 2011) (rejecting the proposition that statutory ambiguity "should be resolved in favor of the veteran instead of by reference to the DVA's interpretation of a statute that it has been entrusted to administer."); *but see Kirkendall v. Dep't of Army*, 479 F.3d 830, 845-46 (Fed. Cir. 2007) (*en banc*) (suggesting in dicta that the

Uniformed Services Employment and Reemployment Rights Act should be interpreted in a veteran's favor in an appeal from the Merit Systems Protection Board).

Use of the pro-claimant canon at *Chevron* step one would also run afoul of *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003), which held that "[e]ven where the meaning of a statutory provision is ambiguous, we must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case." *See also Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (stating that VA's reasonable interpretation of an ambiguous statute is entitled to deference despite the pro-claimant canon); *Guerra*, 642 F.3d at 1051 (noting that the Court has "rejected the argument that the pro-veteran canon of construction overrides the deference due to the [VA's] reasonable interpretation of an ambiguous statute." (citing *Sears*, 349 F.3d at 1331-32)). Using the pro-claimant canon at *Chevron* step one to make an ambiguous phrase like "in the Republic of Vietnam" unambiguous would do more than invalidate VA's otherwise reasonable regulation, it would render it a nullity.

This Court thus routinely considers the pro-claimant canon during its review of VA regulations at step two of *Chevron*. *See, e.g.*, *Veterans Justice Group, LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1352 (Fed. Cir. 2016) (considering the

pro-claimant canon as applied to VA's regulation at *Chevron* step two after finding the statute silent on the definition of "application"); *Disabled Am. Vet. v. Gober*, 234 F.3d 682, 691-92 (Fed. Cir. 2000) (finding that "the VA resolved the ambiguity in 38 U.S.C. § 7111 in favor of the veteran."). In fact, the Court has only relied upon the pro-claimant canon as an aid in interpreting a veterans benefits statute where (i) VA has not previously interpreted the statute in question or (ii) the Court has concluded that VA's interpretation of an ambiguous statute is unreasonable or contrary to the statute. *See, e.g., Sursely v. Peake,* 551 F.3d 1351, 1357 n.5 (Fed. Cir. 2009); *Viegas v. Shinseki*, 705 F.3d 1374, 1380 (Fed. Cir. 2013); *Hix v. Gober*, 225 F.3d 1377, 1380 (Fed. Cir. 2000); *cf. Henderson v. Shinkseki*, 562 U.S. 428, 441 (2011) (interpreting statutory language where VA had not previously interpreted it); *Brown*, 513 U.S. at 117-18 (finding that VA's regulation conflicted with the plain meaning of the statute). Neither of those situations is present here. *See Haas*, 525 F.3d at 1186-1195 (reviewing and upholding VA's interpretation of 38 C.F.R. § 3.307(a)(6)(iii)).

This Court's precedent further suggests that the pro-claimant canon should have no impact on *either* step of the *Chevron* analysis with respect to veterans benefits statutes. *See Nielson v. Shinseki*, 607 F.3d 802, 808 & n.4 (Fed. Cir. 2010) ("The mere fact that the particular words of the statute . . . standing alone might be ambiguous does not compel us to resort to the *Brown* canon." (citing *Terry v.*

Principi, 340 F.3d 1378, 1383-84 (Fed. Cir. 2003) (finding no interpretive doubt requiring the application of the pro-claimant canon after consideration of the plain statutory language and *Chevron* analysis); *Sursely*, 551 F.3d at 1355-57 & n.5 (turning to the pro-claimant canon only after other interpretive guidelines did not resolve the ambiguity); *see also Heino*, 683 F.3d at 1379 n.8 ("It is not clear where the *Brown* canon fits within the *Chevron* doctrine, or whether it should be part of the *Chevron* analysis at all." (citations omitted)); *but see Disabled Am. Vet.*, 234 F.3d at 691-92 ("modifying the traditional *Chevron* analysis is the doctrine governing the interpretation of ambiguities in veterans' benefit statutes[.]"). On the issue presented, therefore, the weight of this Court's precedent instructs that the pro-claimant canon has no impact on the Court's *Chevron* step one analysis of veterans benefits statutes such as section 1116.

II. Applying The Pro-Claimant Canon At *Chevron* Step One Would Usurp VA's Role Within The Veterans Benefits Scheme

"[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("[T]he judgments about the way the real world works that have gone into the [agency's] policy are precisely the kind that agencies are better equipped to make than are courts."); *see Mayo Foundation for Medical Educ. & Research v. United States*, 562 U.S. 44, 55-56 (2011) (explaining that among "[t]he principles underlying" *Chevron* deference is the need for an agency to apply "more

than ordinary knowledge" – i.e., "agency expertise" – when "fill[ing] . . . gap[s] left, implicitly or explicitly, by Congress" (internal quotation marks and citations omitted)); *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 866, 845 (1986) (reversing an appellate court that declined to defer to an agency's interpretation of a statute Congress charged it with enforcing); *W. Hagans v. Comm'r of Social Security*, 694 F.3d 287, 294 (3rd Cir. 2012) ("[A]ffording agencies significant discretion to interpret the law they administer recognizes the value of agency expertise and the comparatively limited experience of the judiciary where an interpretation requires specialized knowledge." (citation omitted)).

This Court too has recognized that "[t]he principle of administrative deference has been consistently followed whenever a decision as to the meaning or reach of a statute involves reconciling conflicting policies or depends upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Papierfabrik August Koehler AG v. United States*, 646 F.3d 904, 906 (Fed. Cir. 2011) (citation omitted); *see Cathedral Candle*, 400 F.3d at 1367 (giving "considerable weight" to an interpretation that is the product of an agency's "specialized expertise" in administering the statute at issue); *cf. Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) ("[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to

which courts and litigants may properly resort for guidance.'" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

These principles fundamentally conflict with the proposition that the Court, at *Chevron* step one, should construe an ambiguous statute in a pro-claimant manner. As this Court has consistently recognized, VA possesses the expertise and experience necessary to determine what "ultimately best serve[s] veterans." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 669 F.3d 1340, 1349 (Fed. Cir. 2012) (noting that VA's determination of what best serves veterans may be informed by experience and data); *see also Paralyzed Veterans of Am.*, 345 F.3d at 1349 (". . . VA's experience in handling claims . . . compel[s] us to grant VA this reasonable amount of deference as to how to best facilitate notice to claimants."); *Read v. Shinseki*, 651 F.3d 1296, 1302 (Fed. Cir. 2011) (holding that VA general counsel opinions "are entitled to consideration for their power to persuade in light of the agency's expertise." (citing *Wanless v. Shinseki*, 618 F.3d 1333, 1338 (Fed. Cir. 2010)).

Moreover, employing the pro-claimant canon at *Chevron* step one would not only usurp VA's Congressionally-authorized role in filling gaps, but would do so permanently as to the particular statutory phrase. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled

to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). In other words, VA would be barred from revisiting unclear statutory language in the event the Court's pro-claimant determination proves detrimental to veterans or fundamentally unworkable for the benefits system.

True to the principles underlying *Chevron*, the Court in *Haas* deferred to VA's interpretation of section 1116 after recounting VA's decades-long consideration of the historic, scientific, and medical evidence underlying the presumption of exposure codified in section 1116. *See Haas*, 525 F.3d at 1186-1195. There is no suggestion that in reaching this decision, the Court was unaware of the pro-claimant canon. To the contrary, in denying rehearing, the Court noted that considering the pro-claimant canon as applied to section 1116 "would present a practical difficulty in determining what it means for an interpretation to be 'pro-claimant.'" *Haas v. Peake*, 544 F.3d 1306, 1308-09 (Fed. Cir. 2008). This "practical difficulty" speaks directly to the principles of agency expertise and policy-making that underlie *Chevron*, and which this Court would disregard were it to apply the pro-claimant canon at *Chevron* step one.

Given that the pro-claimant canon does not require "a pro-claimant outcome in every imaginable case[,]" *Sears*, 349 F.3d at 1331-32, and that VA has already interpreted section 1116 in a pro-claimant manner "by applying it to any veteran

who set foot on land, even if for only a very short period of time," the *Haas* Court sensibly declined to displace the agency's reasonable interpretation, supported by VA's expertise and experience, by resort to the pro-claimant canon. *Haas*, 544 F.3d at 1308-09. The principles underlying *Chevron* as already applied in *Haas* thus counsel against elevating the pro-claimant canon above VA's statutorily-authorized construction of section 1116.

III. The Pro-Claimant Canon Should Not Be Considered A "Traditional Tool Of Statutory Construction"

The pro-claimant canon is not a "traditional tool of statutory construction." *See Chevron*, 437 U.S. at 843 n.9. Courts typically refer to "the statute's structure, canons of statutory construction, and legislative history" when referring to a court's tools at *Chevron* step one. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (quoting *Chevron*, 467 U.S. at 843 n.9); *see, e.g.*, *Haas*, 525 F.3d at 1184 (reviewing section 1116's text, legislative history, and structure). Unlike the pro-claimant canon, these tools share a common purpose – to discern the intent of Congress. *See Chicksaw Nation v. United States*, 534 U.S. 84, 94 (2001) ("[Canons] are designed to help judges determine the Legislature's intent as embodied in particular statutory language."). Textual canons (e.g., *expressio unius est exclusio alterius*) help courts ascertain the technical meaning of Congress's chosen statutory text. Other canons (e.g., statutes in derogation of common law are to be strictly construed, waiver of sovereign immunity is to be strictly construed)

provide courts with an analytical starting point in determining Congress's intent by requiring that Congress provide a clear expression of intent to override a fundamental tenet of the legal system.

In contrast, the pro-claimant canon neither helps to identify the technical meaning of statutory text nor does it enforce the requirement of a clear expression of Congress's intent. The pro-claimant canon arose from dicta in older Supreme Court cases such as *Boone v. Lighter*, 319 U.S. 561 (1943) and *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946), and was revived through brief references in *Gardner* and *Henderson*. A survey of its application in this Court indicates that the pro-claimant canon is better understood as a doctrine that reminds agencies and courts, in the absence of countervailing considerations, to resolve doubt in a claimant's favor. *See Sears*, 349 F.3d at 1331-32. This view of the canon explains why courts typically mention the pro-claimant canon (i) only *after* conducting the *Chevron* analysis, *see, e.g., Gallegos*, 283 F.3d at 1314; *Disabled Am. Veterans*, 234 F.3d at 694, or (ii) when there is no reasonable VA interpretation owed deference. *See, e.g., Sursely*, 551 F.3d at 1357 & n.5; *Viegas*, 705 F.3d at 1380; *Hix*, 225 F.3d at 1380.

Finally, if the pro-claimant canon is a traditional tool of statutory construction to be employed at *Chevron* step one, it makes little sense that it can be "waived," as the Court found when denying rehearing in *Haas*. *Haas*, 544 F.3d at

1308. *Chevron* does not instruct courts to use only the statutory construction tools raised by the parties; it instructs courts to employ any applicable tool of statutory construction. The waiver finding in *Haas* is therefore incompatible with the notion that the pro-claimant canon is a traditional tool of construction to be used at *Chevron* step one to determine the intent of Congress. *See Kisor v. Shulkin*, 880 F.3d 1378, 1382 (Fed. Cir. 2018) (O'Malley, J., dissenting) ("The central focus of the parties' arguments was the interpretation of § 3.156(c)(1). It is hard to imagine how a party can waive the question of the correct legal standard to apply in deciding that question."). To remedy this incompatibility, should the panel hold that the pro-claimant canon is a step one tool, the panel should disregard the waiver finding in the rehearing denial, and recognize that it is bound by the *Haas* Court's holding of ambiguity in section 1116. *Haas*, 525 F.3d at 1186 ("Having concluded that the phrase 'served in the Republic of Vietnam' in section 1116 is ambiguous, we turn to 'step two' of the *Chevron* analysis, which requires a court to defer to an agency's authorized interpretation of the statute in question if 'the agency's answer is based on a permissible construction of the statute.'" (quoting *Chevron*, 467 U.S. at 843)). That is, if the pro-claimant canon is indeed a traditional tool of construction, then Mr. Haas's failure to raise an argument as to its applicability could neither result in waiver of the canon nor detract from the precedential effect of *Haas* on this panel. *See Nat'l Org. of Veterans' Advocates, Inc.*, 260 F.3d at

1374 ("[S]tare decisis is a doctrine that binds courts to follow their own earlier decisions or the decisions of a superior tribunal.").

CONCLUSION

For these reasons, and the reasons given in our principal brief, we respectfully request that the Court dismiss Mr. Procopio's challenges to the Court of Appeals for Veterans Claims' (Veterans Court) factual findings and application of law to fact, and otherwise affirm the decision of the Veterans Court.

Respectfully submitted,

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June 4, 2018

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B), as modified by the Court's order dated May 21, 2018, which limited this supplemental brief to not more than 15 pages. In making this certification, I have relied upon the word count function of the word-processing system used to prepare this brief. According to the word count, this brief contains 3,506 words.

June 4, 2018

/s/Eric P. Bruskin
ERIC P. BRUSKIN

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 4th day of June, 2018, a copy of the foregoing "Respondent-Appellee's Supplemental Brief" was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Eric P. Bruskin
ERIC P. BRUSKIN