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By fax to (202) 273-9026 and First Class Mail

Director, Regulation Policy and Management (00REG)
Department of Veterans Affairs
810 Vermont Avenue NW, Room 1063B
Washington, DC 20420

Re: RIN 2900-AQ26—VA Claims and Appeals Modernization

Dear Sir or Madam:

Military-Veterans Advocacy Inc. (MVA) is a tax exempt IRC 501[c][3] organization based in Slidell, Louisiana that works for the benefit of the armed forces and military veterans. Through litigation, legislation and education, MVA works to advance benefits for those who are serving or have served in the military. In support of this, MVA provides support for various legislation on the State and Federal levels as well as engaging in targeted litigation to assist those who have served.

As well as legislative advocacy, Military-Veterans Advocacy represents veterans in all facets of the veterans law system. MVA is admitted to practice before the Department of Veterans Affairs, the Court of Appeals for Veterans Claims, the Court of Appeals for the Federal Circuit and the Supreme Court of the United States.

Military-Veterans Advocacy strongly opposed the Veterans Appeals and Modernization Act of 2017, Pub. L. 115-55 and will continue to work for legislation that will help, not hinder, the appeals process. The proposed rule, however, generally mirrors the legislation. To the extent that it proposes action not specifically authorized by the statute, Military-Veterans Advocacy opposes the regulation.

One specific concern is proposed 20.202(c)(2), which restricts the ability of the veteran to shift lanes or otherwise amend the Notice of Disagreement, to one year after the original denial. The proposed rule reads as follows:

(2) A claimant may modify the information identified in the Notice of Disagreement for the purpose of selecting a different evidentiary record option as described in paragraph (b) of this section. Requests to modify a Notice of Disagreement must be in writing, must clearly identify the option listed in

paragraph (b) of this section that the appellant requests, and must be received at the Board within one year from the date that the agency of original jurisdiction mails notice of the decision on appeal, or within 30 days of the date that the Board receives the Notice of Disagreement, whichever is later. Requests to modify a Notice of Disagreement will not be granted if the appellant has submitted evidence or testimony as described in §§ 20.302 and 20.303.

The statutory guidance does not include a one year limitation for any type of modification, including amendments to the Notice of Disagreement. The pertinent provision of Pub. L. 115-55 modifies 38 U.S.C. § 7105(a) (4) as follows:

(4) The Secretary shall develop a policy to permit a claimant to modify the information identified in the notice of disagreement after the notice of disagreement has been filed under this section pursuant to such requirements as the Secretary may prescribe.

Additional statutory guidance also does not include a one year limitation for the ability to shift from one lane to another. The pertinent provision of Pub. L. 115-55 modifies 38 U.S.C. § 7107(e) as follows:

(e) The Secretary shall develop and implement a policy allowing an appellant to move the appellant's case from one docket to another docket.

MVA took the lead in requesting Congress to require the Secretary to promulgate rules to allow a veteran to amend the Notice of Disagreement and to transfer cases between dockets. http://www.militaryveteransadvocacy.org/sites/default/files/written%20testimony.517.SVAC_complete.finalwpd.pdf. Liberal amending procedures are the norm in both courts and other federal administrative tribunals. Nothing in the statute, the legislative history or the negotiations between Military-Veterans Advocacy and the Senate Committee envisioned any time limit on the ability to amend or transfer between dockets

The reason for liberality is clear. Many veterans become dissatisfied with the incompetence of the Veterans Service Organizations (VSO)s and seek assistance from attorneys. Reviews of the record normally reveal that the case preparation is woefully inadequate. Often the VSOs will select a "quicker" pathway to clear their own backlog, without adequately preparing an evidence package. They tend to waive hearings and the right to submit additional documentation. If one year has passed since the denial by the agency of original jurisdiction, the attorney is locked in to the defective choices of the VSO.

Additionally, the ability to amend the notice of disagreement or to transfer to another dockets is cut off if evidence or testimony has been submitted. There is nothing in the statute to authorize such a draconian action.

At a minimum, due process requires that there be a reasonable amount of time for a new power of attorney or attorney to review the case, amend the notice of disagreement, submit additional evidence and if necessary transfer between dockets.

The Secretary will claim that these provisions are reasonable “gap fillers” and demand the protections of deference pursuant to *Auer v. Robbins*, 519 U.S. 452, 461-63, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) and *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Such reliance is misplaced. *Auer* and *Chevron* deference must bow to the often affirmed pro-veteran or pro-claimant canon of statutory construction.

The pro-claimant canon stands out as a public policy designed to ensure that veterans obtain their earned benefits. It is based on the belief that a thankful nation must, in the words of Abraham Lincoln, “care for him who shall have borne the battle and for his widow, and his orphan.” This maxim, although adopted as the VA motto adorning the outside wall of VA Headquarters, <https://www.va.gov/opa/publications/celebrate/vamotto.pdf>, has been widely ignored by the burgeoning bureaucracy the VA has become.

Without question, canons of construction must be applied before any type of deference is explored under *Auer* or *Chevron*. The Supreme Court has recently spoken out on this very issue. In *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018), the Supreme Court held that canons of construction should be applied at the first step of the *Chevron* analysis. Speaking for the majority Justice Gorsuch said as follows:

Finally, the *Chevron* Court explained that deference is not due unless a “court, employing traditional tools of statutory construction,” is left with an unresolved ambiguity. 467 U.S., at 843, n. 9, 104 S.Ct. 2778. And that too is missing: the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today’s interpretive puzzle. Where, as here, the canons supply an answer, “*Chevron* leaves the stage.” *Alternative Entertainment*, 858 F.3d, at 417 (opinion of Sutton, J.)”

Id.

The pro-claimant or pro-veteran canon has been repeatedly recognized as an accepted canon of statutory construction. A unanimous Supreme Court re-affirmed “the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.” *Henderson ex rel. Henderson v. Shinseki* 561 U.S. 428, 441, 131 S.Ct. 1197, 1206 (2011). The Federal Circuit has also recognized the paternalistic non-adversarial intent of the system designed by Congress. *Gambill v. Shinseki*, 576 F.3d 1307, 1317 (Fed. Cir.2009). The *Gambill* court described the process as uniquely pro-claimant.” *Id.* at 1316. Applying the holding of *Epic*, this canon of construction should have been used during the initial step in the

Chevron analysis.

As recently as last year, Judge O'Malley argued in dissent that there is little logic deferring to agency regulations "promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated." *Kisor v. Shulkin*, 880 F.3d 1378, 1379 (Fed. Cir. 2018)(O'Malley, J dissenting).

Since the days of World War II, the United States, has properly recognized that "legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone v. Lightner, supra.*). Military veterans have "been obliged to drop their own affairs and take up the burdens of the nation" (*Boone*, 319 U.S. at 575), "subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service" (*Johnson v. Robison*, 415 U.S. 361, 380 (1974)). Gone are the days of the veteran amputees squatting along the road to beg for pennies or the bonus marchers being forcibly dispersed by federal troops. Instead the United States adopted the "long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan v. Taxation with Representation*, 461 U.S. 540, 550-551 (1983). This led to the pro-claimant canon which requires interpretative ambiguities to be resolved in favor of the beneficiaries. See, e.g., *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Hodge v. West*, 155 F.3d 1356, 1361-1362 (Fed. Cir. 1998) (use of canon in construing regulations).

Epic Systems is merely the latest in the Supreme Court move to limit the effects of *Chevron* deference. In the term following *Henderson*, the High Court put the brakes on unfettered and excessive *Chevron* deference in *Christopher v. Smith Kline Beecham Corp.*, 132 S.Ct. 2156 (2012), finding no deference when:

it appears that the interpretation is nothing more than a "convenient litigating position," or a " ' *post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack. (Citations omitted).

Christopher v. Smith Kline Beecham Corp. 567 U.S. 142, 155, 132 S.Ct. at 2166 -2167 (2012). *Epic* represents the next logical step in this process.

In many respects, the *Henderson*, *Christopher*, *Epic*, trilogy is really a restatement of the original intent of *Chevron*. In an often forgotten footnote, the *Chevron* Court noted that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. Reading this note *in para materia* with *Henderson*, *Christopher* and *Epic* there is no doubt that the Supreme Court intended, and perhaps always intended, for canons of construction to be applied during the first step in the process.

Here there is little evidence that *Chevron* intended to challenge the canons of statutory

construction. Indeed, as discussed *supra*, *Chevron* itself conceded that canons should be applied before undertaking step two of the analysis. The *Chevron* Court noted that the first step in the process is to determine the intent of Congress and, if clear, that is the end of the matter. *Chevron*, 467 U.S. at 842-43. It makes sense that the canons of statutory construction would first be used to ascertain the clarity of the Congressional intent. *Smith v. United States*, 507 U.S. 197, 209, 113 S. Ct. 1178, 1186, 122 L. Ed. 2d 548 (1993) (Stevens, J. dissenting). See also, *Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S. Ct. 528, 535, 151 L. Ed. 2d 474 (2001) ([canons of construction] are designed to help judges determine the Legislature's intent as embodied in particular statutory language).

Throughout its post-*Chevron* history, the Supreme Court has required other canons of construction to be applied at step one in the *Chevron* process. See, e.g., *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 20-21 (2007) (applying the preemption canon instead of *Chevron*); *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005) (applying the canon of constitutional avoidance instead of *Chevron*).

In a case analogous to veterans, the Supreme Court has also ruled that canons favoring Native American tribes should be applied and construed liberally in favor of the Indians, with any ambiguity interpreted to their benefit. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403, 85 L. Ed. 2d 753 (1985). As is the case with veterans, the Supreme Court found that a special relationship exists between the United States and the recognized tribes.

The District of Columbia Circuit has applied this concept with some frequency. See, e.g., *Cobell v. Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006) (holding that the “normally applicable [*Chevron*] deference was trumped by the requirement” to construe statutes “liberally in favor of the Indians”); *Massachusetts v. DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996). Other Circuits have similarly embraced considering canons of construction before applying deference. See, e.g., *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997).

Courts should look to the purpose behind judicial doctrines, such as the delegation doctrine, and canons of construction. *Chevron*, the pro-veteran canon, and other substantive canons all ultimately derive their legitimacy from the fact that they are rooted in congressional intent. *Chevron* is typically justified as an implicit delegation from Congress to agencies, and the substantive canons are likewise justified based on the fact that they reflect Congress’s intent. See, e.g., *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S.Ct. 570, 574 (1991). (explaining that Court’s should presume that Congress legislates against the backdrop of the pro-veteran canon); see also Slocum, *The Importance of Being Ambiguous*, 69 Md. L. Rev. 791, 812–15 & n.111-129 (discussing this issue and giving many examples of how the Court has justified the substantive canons based on intent).

Because *Chevron* and the canons of statutory construction are designed to help Court’s discern Congressional intent, the resolution of any conflict between the canons should be determined by considering Congress’s likely intent. Here, Congress’s specific intent with respect

to veterans (the pro-veteran canon) trumps its more general delegation doctrine espoused by *Chevron*). This approach is consistent with the general rule that when statutory provisions appear to conflict, the specific provision controls over general provisions. Although this case involves conflicting presumptions (pro-claimant vs. *Chevron*), rather than conflicting statutory provisions, the same basic guiding principle of determining whether Congress' intent still applies. See, generally *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S.Ct. 1989, 1992-93, (1976) (a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum). Absent a clear intention to the contrary, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *Morton v. Mancari*, 417 U.S. 535, 550-551, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290, 301. Members of Congress are presumed to know the law, and absent a clear expression in a general statute contradicting a specific act, there should be no assumption that they intended to invalidate the specific act. The same holds true with judicial doctrines. The *Chevron* delegation doctrine should not be construed to nullify the specific pre-claimant canon of construction that has long been seen as a manifestation of Congressional will. *Henderson*, 462 U.S. at 440.

Or as Judge O'Malley said: "A regulation cannot be so ambiguous as to require. . . deference if a pro-veteran interpretation of the regulation is possible." *Kisor v. Shulkin*, 880 F.3d at 1381.

Although the *Haas* Court did not apply the pro-claimant canon of construction they did attempt to marginalize it. In reliance upon *Sears v. Principi*, 349 F.3d 1326 (Fed. Cir. 2003), *Haas* questioned the impact of the canon on a *Chevron* analysis. That doubt was misplaced. *Sears* itself noted that the facts in that case did not "conflict with the spirit of the veterans' benefits scheme in any substantial way, or at all." *Sears*, 349 F.3d at 1332. That is not the case here. Stripping tens of thousands of veterans from a presumption of exposure that had been recognized for over a decade could not be construed in any way as being in consonance with the spirit of the veterans benefits scheme. Notably, both *Sears* and *Haas* were decided prior to the *Henderson*, *Christopher*, *Epic* trilogy.

This Court has always recognized the Congressional intent that the administration of veterans benefits be non-adversarial. Congress itself, noted their intent to foster a pro-claimant benefits system. In *Hodge v. West*, *supra.*, the Court quoted from the legislative history of the Veteran's Judicial Review Act and Veterans' Benefits Improvement Act of 1988:

Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally bypassed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.

[I]mplicit in such a beneficial system has been an evolution of a completely ex-

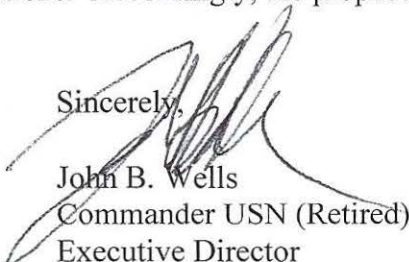
parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof. H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95 (emphasis added). This passage demonstrates that, even in creating judicial review in the veterans context, Congress intended to preserve the historic, pro-claimant system.

Hodge v. West, 155 F.3d at 1362-63 (Fed. Cir. 1998).

Unfortunately, the VA benefits system and VA law have gotten too adversarial, esoteric and technical. The process has become much more complicated than that envisioned by Congress and this regulation serves as a perfect example of that. The Federal Circuit is presently considering whether the application of the pro-claimant canon of construction in veterans cases is the first step of the *Chevron* analysis. There is no indication that Congress intended to legislate a time limit.

The proposed regulation is not a "gap filler." Instead it is an unlawful and *ultra vires* action on the part of the Secretary. In applying the pro-veteran canon, as the VA must, ambiguity, if any, must be resolved in the favor of the veterans. In this case, the canon requires that the statutes be implemented without anytime restrictions. Accordingly, the proposed time requirement in 38 C.F.R. 20.202 must be struck.

Sincerely,



John B. Wells
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Executive Director