

NO. 2025-3561

In the Supreme Court of the United States

MARK SCOUT,
Petitioner,

v.

DOUGLAS A. COLLINS,
Secretary of Veterans Affairs,
Respondent.

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

BRIEF FOR THE PETITIONER

Counsel of Record
TEAM NUMBER P23

ISSUES PRESENTED FOR REVIEW

1. Whether the requirement for a "mandatory VA examination" under Diagnostic Code 7531, 38 C.F.R. § 4.115b, is unconstitutional as applied on First Amendment grounds in light of the petitioner's religious objections?
2. Whether hyperlinked content provided by a claimant must be reviewed by the Department of Veterans Affairs (VA), and if not, whether the U.S. Court of Appeals for Veterans Claims exceeded its jurisdiction in making de novo factfinding when it found that VA's error was harmless?

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

STANDARD OF REVIEW 5

ARGUMENT..... 5

I. THE MANDATORY VA C&P EXAM VIOLATES THE FREE EXERCISE CLAUSE UNDER THE FIRST AMENDMENT AS APPLIED 5

 A. *VA’s mandatory examination rule as applied is neither neutral nor generally applicable, thus strict scrutiny must apply.* 6

 B. *VA’s action cannot survive strict scrutiny test.* 9

 C. *VA’s action punished veteran’s religious exercise, violating pro-veteran canon and statutory entitlement.*.....12

II. THE BOARD’S REFUSAL TO REVIEW THE HYPERLINKED VIDEO IDENTIFIED BY THE VETERAN VIOLATED ITS DUTY TO CONSIDER ALL RELEVANT EVIDENCE.....13

 A. *The Constructive Possession Doctrine Required the Board to Review the Hyperlink.*.....15

1. The Three-Part Test Governing Constructive Possession.....	16
B. <i>This Case is Distinguishable from Bowey v. West, 11 Vet. App. 106</i> <i>(1998)</i>	19
III. THE BOARD’S ERROR WAS PREJUDICIAL BECAUSE THE EXCLUDED EVIDENCE DIRECTLY BEARS ON THE OUTCOME OF THE CLAIM.....	20
A. <i>Tadlock</i> Confirms That the Error Was Prejudicial.....	21
B. <i>Runions</i> Reinforces that Omitting Favorable Evidence Frustrates Judicial Review.	22
CONCLUSION	24

TABLE OF AUTHORITIES

CASES:	PAGE
<i>Bowey v. West</i> , 11 Vet. App. 106 (1998)	21
<i>Brown v. Gardner</i> , 513 U.S. 115, (1994).....	12
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682, (2014)	8
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940).....	6, 10
<i>Conyers v. McDonough</i> , 91 F.4th 1167 (Fed. Cir. 2024)	14, 15, 16, 19, 25
<i>Cushman v. Shinseki</i> , 576 F.3d 1290, 1298 (2009)	12
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990)	7
<i>Euzebio v. McDonough</i> , 989 F.3d 1305 (Fed. Cir. 2021)	14, 16, 17, 18, 25
<i>Fulton v. City of Philadelphia</i> , 593 U.S. 522 (2021)	8
<i>Gonzales v. O Centro Espirita Beneficente União do Vegetal</i> , 546 U.S. 418 (2006)	5, 8, 11
<i>Inland Waterways Corp. v. Young</i> , 309 U.S. 517, 522 (1940).....	11
<i>Lang v. Wilkie</i> , 971 F.3d 1348 (Fed. Cir. 2020).....	14, 16, 18, 25
<i>Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n</i> , 584 U.S. 617 (2018).....	8
<i>Murphy v. Derwinski</i> , 1 Vet. App. 78 (1990)	15, 25
<i>Runions v. Collins</i> , No. 24-4275, 2025 WL 1805555 (Vet. App. July 1, 2025)	24, 25
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	6, 7
<i>Tadlock v. McDonough</i> , 5 F.4th 1327 (Fed. Cir. 2021).....	23, 25
<i>Varad v. McDonough</i> , 37 Vet. App. 198 (2024)	14, 16, 21, 25
<i>United States v. Ballard</i> , 322 U.S. 78, (1944).....	9, 10
 STATUTES:	
38 U.S.C. § 7261(b)(2).....	22
38 U.S.C. §§ 5103A	14, 17, 24
38 U.S.C. §1110.....	12
38 U.S.C. §5103(b)	13
38 U.S.C. §5103A(d)(2).....	12
38 U.S.C. §5107(b)	14
38 U.S.C. §7104(a)	14, 17, 20, 23
42 U.S.C. §2000bb-1.....	8, 9
Religious Freedom Restoration Act of 1993, 42 U.S.C §§ 2000bb- 2000bb-4.....	8
Veterans’ Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988)	13
 REGULATIONS:	
38 C.F.R.§ 4.115a	9, 11, 12, 13
38 C.F.R § 4.115b	11
38 C.F.R. §3.655(a).....	8, 9

STATEMENT OF THE CASE

Petitioner Mark Scout served in the United States Marine Corps on active duty from June 1980 to June 1984, during which he served more than 30 days in Camp Lejeune and was exposed to contaminated water. J.A. at 82.

In March 2019, the petitioner filed a VA disability claim for kidney disease from that exposure and was granted service connection with an 80 percent evaluation for stage IV kidney disease under Diagnostic Code (DC) 7502. J.A. at 77.

In November 2021, petitioner underwent a kidney transplant due to renal failure associated with his kidney disease. Petitioner filed a supplemental claim and was granted a 100 percent under DC 7531 for one year following hospital discharge. J.A. at 63.

In November 2022, the VA scheduled a C&P examination for petitioner to evaluate the residuals of his kidney transplant. The petitioner submitted a VA Form 21-4138, Statement in Support of Claim, declining to attend the C&P exam explaining that he feared VA involvement would jeopardize his healing process and that he trusted only Mr. Ricken Hale, a naturopathic practitioner, for any future treatment. J.A. at 52.

Based on petitioner's absence, the VA proposed to reduce his evaluation from 100 percent to 30 percent and finalized the reduction in February 2023. J.A. at 47 and 38. In March 2023, petitioner submitted VA Form 10182, Notice of Disagreement, and requested a hearing before a Veterans Law Judge at the Board of Veterans' Appeals. J.A. at 32.

During the hearing, petitioner explained that his refusal to attend the C&P exam stemmed from a traumatic near-death experience during the kidney transplant surgery; afterward, he adopted a religious belief that participation in conventional medical practice is a "sin." J.A. at 29. Petitioner

also provided a report from Mr. Hale affirming that his GFR averaged around 25 during the past year, along with a video submitted via hyperlink explaining Mr. Hale's healing approach. J.A. at 31.

In its decision, the Board of Veterans' Appeals (Board) affirmed the Agency of Original Jurisdiction (AOJ) decision to reduce renal failure from 100 percent to 30 percent. J.A. at 19. The Board found no probative value to Mr. Hale's report, finding that it lacked a "medically sound or clinically informed basis."; the Board also refused to access the hyperlinked video provided by the petitioner during the hearing, reasoning that a URL is merely a reference and not actual evidence. J.A. at 23.

Mr. Scout appealed to the Court of Appeals for Veterans Claims (CAVC) asserting that (1) the VA violated his First Amendment rights by reducing his benefits for failing to attend the C&P exam for religious reasons, and (2) the Board erred by failing to review the evidence contained in the hyperlink. J.A. at 15. The CAVC affirmed the Board's decision, holding that any error was "harmless" because Mr. Hale lacked recognized medical credentials and was "incompetent" to provide a medical opinion. J.A. at 13. The CAVC declined to address the constitutional issue, reasoning that petitioner's argument was "underdeveloped." J.A. at 18.

On appeal, the Federal Circuit affirmed the CAVC's decision. On the First Amendment issue, while the Federal Circuit acknowledged that strict scrutiny applies in this case, it held that the government satisfied that standard by demonstrating a compelling interest in safeguarding the integrity of public resources in administering VA laws. J.A. at 9. The court reasoned that VA examinations serve as a standard mechanism to ensure that veterans receive evaluations from practitioners knowledgeable about VA procedures and who are able to provide the data required for swift adjudication of VA claims. *Id.* Therefore, the Federal Circuit found that VA did not

violate Mr. Scout's First Amendment rights. On the issue of the Board's obligation to review the hyperlink, the Federal Circuit held that the Board was required to review the URL; however, it concluded that doing so would not have changed the outcome of the case because Mr. Hale was not a competent medical professional to provide an evaluation of the residuals following the kidney transplant. J.A. at 11.

Petitioner thereafter sought review in this Court, which granted certiorari to resolve questions of substantial constitutional and administrative significance.

SUMMARY OF THE ARGUMENT

The issues before this Court are whether the Department of Veterans Affairs may compel a veteran to abandon his faith to receive the benefits he rightfully earned, and whether it may then ignore crucial evidence simply because it is digital. **The answer to both is no!**

First, the mandatory C&P examination, as applied to Mr. Scout, violated the Religious Freedom Restoration Act and the Free Exercise Clause. The rule burdens sincere religious exercise and is not neutral or generally applicable because it contains “good cause” exemptions. Under RFRA, strict scrutiny applies, and the VA cannot satisfy it. Forcing Mr. Scout to attend an exam contrary to his faith imposes a substantial burden, and the agency cannot show that this was the least restrictive means. The VA could have relied on existing records, telehealth review, or clarification from Mr. Hale. Its refusal to accommodate Mr. Scout’s faith violated both constitutional guarantees and the pro-veteran canon requiring that doubt be resolved in the veteran’s favor.

Second, the Board compounded that error by refusing to review a YouTube video that Mr. Scout identified by exact URL during his hearing. The video contained his practitioner’s detailed explanation of the medical basis for his opinion, yet the Board refused to open it, declaring that a hyperlink “is not content” and therefore “not a document.” That conclusion violated 38 U.S.C. §§ 5103A, 7104(a), and the constructive-possession doctrine which require the Board to consider clearly identified evidence within its control. The omission was not harmless. The video addressed the very basis for the rating reduction, and the prejudice lies in the Board’s failure to review it at all.

Veterans deserve better. Mr. Scout served with honor; the Board failed its duty. This Court should reverse to restore fairness and fidelity to the law.

STANDARD OF REVIEW

The standard of review for the first question is de novo. Whether the government’s application of 38 C.F.R. § 4.115b violates the petitioner’s Free Exercise rights under the First Amendment presents a pure question of law. Constitutional challenges to federal regulations are reviewed de novo. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006). Under the Religious Freedom Restoration Act, agency actions that burden religious exercise must satisfy strict scrutiny, and the government bears the burden of proving that the rule is the least restrictive means of furthering a compelling interest.

The second question is also reviewed de novo. Whether the Board of Veterans’ Appeals violated its statutory duty to consider all relevant evidence is a question of law. *Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021); *Conyers v. McDonough*, 91 F.4th 1167 (Fed. Cir. 2024). The Court must also take due account of the rule of prejudicial error, 38 U.S.C. § 7261(b)(2), and may not treat the omission of material evidence as harmless when it affects the fairness or outcome of the adjudication. *Tadlock v. McDonough*, 5 F.4th 1327 (Fed. Cir. 2021).

ARGUMENT

I. THE MANDATORY VA C&P EXAM VIOLATES THE FREE EXERCISE CLAUSE UNDER THE FIRST AMENDMENT AS APPLIED

The First Amendment of the United States Constitution states, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...”. The latter part of the sentence is known as the free exercise clause of the First Amendment. It prohibits government from limiting religious practice.

This Court has also repeatedly ruled that government should not compel or punish religious beliefs; but it also held that the free exercise clause protection is not absolute. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held that the First Amendment “embraces two concepts: freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.” *Id.*

Since *Cantwell*, this Court has generally determined that denying government benefits based on individual’s sincere religious belief is prohibited by the free exercise clause. The government must satisfy the strict scrutiny test by showing a compelling public interest. Here, the VA has failed to meet this standard.

A. VA’s mandatory examination rule as applied is neither neutral nor generally applicable, thus strict scrutiny must apply.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court established the famous Sherbert test and held that strict scrutiny applies when law puts burden on religious practice. The plaintiff of the case was a member of the Seventh-day Adventist Church that observes Sabbath, on which day the believers should not do any work, from sunset Friday to sunset Saturday. The plaintiff was fired for refusal to work on Saturday and subsequently denied unemployment benefits by the State of South Carolina due to her restricted availability on Saturdays. In the decision, Justice Brennan introduced two questions, later known as the Sherbert Test: 1) whether the disqualifying for benefits imposes any burden on plaintiff’s free exercise of religion; 2) whether there is any compelling government interest that justifies the infringement of benefits, and/or any alternative form of regulation would reduce such infringement of First Amendment right. The majority first opined that the government’s action forced the plaintiff to “choose between following the precepts of her religion and forfeiting benefits”. See *Sherbert* at 404. Secondly, the Court stated that the

government's argument that unemployment compensation was a "right" and not "privilege" was not sufficient compared to the free exercise clause under the First Amendment. *Id.* ("it is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.") Lastly, the government must show compelling interest and no alternative means available. When the State argued by granting unemployment benefits to those who did not go to work on certain days due to religious reason would encourage frivolous claims and threaten unemployment fund, the majority held that the state must still show that no alternative means would combat such abuse. *Id.* at 407.

The Sherbert Test has been used for decades on government benefit cases and free exercise clause until 1990, when the Court shifted to a more neutral view on the free exercise clause. In 1990, this Court ruled in favor of the government in *Employment Division v. Smith*, 494 U.S. 872 (1990). In that case, the respondents Alfred Smith and Galen Black were terminated by their employer for ingesting peyote, a controlled substance that would cause hallucination, during a Native American Church ritual as part of the sacrament. The respondents were later denied unemployment benefits based on their termination was for misconduct. The majority opinion by Justice Scalia stated that if a law was generally applicable, then the free exercise clause would not relieve an individual's obligation to comply with such law. *Id.* at 874. ("The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability..."). Moreover, Justice Scalia emphasized that Sherbert test was developed based on an "individualized governmental assessment of the reasons for the relevant conduct" and therefore should not be applied in criminal cases such as this one. *Id.* at 884. In conclusion, the Court ruled in favor of the government based on a new, neutral law of general applicability standard that a

neutral law of general applicability that burdens free religious exercise does not violate the free exercise clause under the First Amendment.

The *Smith* case triggered many consequences. Public fear that the strict scrutiny test would be replaced by the general applicable law standard, even though the ruling left room for laws that allows individualized assessment or permission still undergo strict scrutiny test. There are two more decisions that further clarified the neutral general applicability standard. One is *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617 (2018), this Court held that the government did not conduct itself in a neutral manner towards religion and therefore violated the free exercise clause under the First Amendment. Another case worth noting is *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) where this Court decided that a law “is not generally applicable” if it creates a “good cause” standard to allow the government to grant exemption based on individual’s particular circumstances. *Id.* at 534.

Additionally, Congress passed the Religious Freedom Restoration Act of 1993, 42 U.S.C §§ 2000bb- 2000bb-4, which states “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government can demonstrate that the burden has compelling government interest and is the least restrictive means in advancing that compelling interest. *See* 42 U.S.C. §2000bb-1. Although declared as unconstitutional when applying to state and local government, this Court has applied RFRA in favor of exercising of religion and against the federal government in many other cases such as *Gonzales*, and more recently, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, (2014). Since *Burwell*, this Court has held that RFRA applies to all federal agencies, including the VA. Under RFRA, any federal government agency actions that burden free exercise of religion are

facing strict scrutiny unless it can demonstrate 1) there is a compelling government interest; and 2) such action is the least restrictive measure in furtherance of that interest.

Ever since *Sherbert*, this Court made many precedential decisions invoking the free exercise clause of the First Amendment. One thing that has not changed is the strict scrutiny requirement. Even though in case of *Employment Division* Justice Scalia limited applicability of the Sherbert test, as a federal agency, the VA must still pass the strict scrutiny test under the RFRA. In addition, 38 C.F.R. §3.655(a) allows an individualized assessment when a VA claimant failed to report for VA examination. It states,

When entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination and a claimant, without good cause, fails to report for such examination, or reexamination, action shall be taken in accordance with paragraph (b) or (c) of this section as appropriate. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc....

Id.

This “good cause” exemption to allow an individualized assessment, which makes it “not generally applicable” under *Fulton*. Lastly, the petitioner contends the VA did not employ neutrality during the Board hearing and therefore not being “neutral” to his religion under *Masterpiece Cakeshop*, which will be discussed in another section. Nonetheless, RFRA required VA’s action to be reviewed under strict scrutiny test.

B. VA’s action cannot survive strict scrutiny test.

Under RFRA, the federal government cannot take any action that substantially burdens the free exercise of religion unless that action is the least restrictive means of furthering a compelling government interest. *See Burwell* at 690 and 42 U.S.C. §2000bb-1. To survive the strict scrutiny test, VA must meet all three criteria: 1) there is no substantial burden to petitioner’s free exercise

of religion; 2) it is to further compelling governmental interest; and 3) there is no other alternative ways to further that interest without burdening the claimant.

1. VA's action has substantially burdened petitioner's sincere religious exercise

This Court has repeatedly held that a person's religious view is not subject to trial, no matter how ridiculous or preposterous it may sound, provided that the person practice the religion with "good faith". See *United States v. Ballard*, 322 U.S. 78, (1944), *Cantwell*, etc. During the Board hearing, petitioner testified that his entire medical treatment is done through naturopathic interventions. He found this belief after a near-death experience during his kidney transplant surgery. The petitioner is not claiming this religion for personal gain; rather, he has found this religious practice helpful for his healing process. Thus, the petitioner has a good faith when practicing his religious belief.

However, the petitioner's belief against VA medical practice has caused him to lose financial benefits. According to VA notification dated February 20, 2023, the petitioner was receiving \$3621.95 per month since December 1, 2022; after the reduction, the petitioner's monthly VA compensation became \$508.05. This represents a difference of \$3113.9 of reduction in benefits per month. J.A. at 33. This amount does not include any ancillary benefits that the petitioner was entitled to as well as access to certain VA healthcare benefits including dental care. The petitioner was penalized for exercising his religion by forfeiting significant amount of federal entitlement. VA's decision has clearly imposed significant burden on the petitioner.

2. VA does not have a narrowly defined compelling interest as required by Court.

VA claims that there is a compelling interest in "ensuring the integrity of the public's finances and the universal administration of benefits." See J.A. at 9. VA invoked *Inland Waterways Corp.*

v. Young, 309 U.S. 517, (1940) to support this claim stating that financial integrity of the government is vital to national interest. However, the issue presented before this Court is not about whether financial integrity is a compelling national interest; the issue is whether imposing a burden on petitioner's exercise of religion would be in furtherance of a compelling governmental interest. Additionally, this Court has emphasized that the government cannot claim a broadly defined goal as compelling interest. Instead, it must demonstrate the compelling interest "through application of the challenged law 'to the person'... whose sincere exercise of religion is being substantially burdened." See *Gonzales* at 430-31 ("[T]his Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.") Therefore, to demonstrate a compelling interest in uniformly mandating a VA C&P exam without any exception for religious reason, VA should provide evidence showing that granting such exception would seriously compromise VA's ability to administer disability compensation benefits program. So far, there is no evidence to support this claim. Thus, the compelling interest claim does not survive the strict scrutiny test.

3. The mandatory C&P exam is not the least restrictive means

Under DC 7531, 38 C.F.R § 4.115b states that following kidney transplant surgery, the condition will be evaluated as renal dysfunction based on the residuals under § 4.115a. To evaluation of renal dysfunction, § 4.115a generally evaluate the level of glomerular filtration rate (GFR) within certain parameter for at least 3 consecutive months during the past 12 months; routine need of regular dialysis is also considered.

In this case, VA uses a recent lab result to evaluate renal dysfunction, thus an in-person examination is not necessarily required under § 4.115a. In other words, all VA needs are lab results

that show a constant level of GFR within the past 12 months for three consecutive months in order to make a rating decision on renal dysfunction without an in-person medical exam. Therefore, forcing the petitioner to travel to a VA facility for C&P exam does not constitute as “least restrictive measure”.

C. VA’s action punished veteran’s religious exercise, violating pro-veteran canon and statutory entitlement.

Since World War I, Congress and Federal Courts have declared that veterans’ benefits are a federal entitlement and not a gratuity. This significantly distinct these benefits from other federal benefit programs. 38 U.S.C. §1110 states, “For disability resulting from personal injury suffered or disease contracted in line of duty... the United States shall pay compensation to any veteran thus disabled”. Federal Court also pointed out:

Veteran's disability benefits are nondiscretionary, statutorily mandated benefits. A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations. We conclude that such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.

Cushman v. Shinseki, 576 F.3d 1290, 1298 (2009)

As such, considering the veteran’s benefits is substantially different from other social benefits, federal courts have adopted a pro-veteran canon. The benefits earned by the veterans are considered as properties under the Fifth Amendment and subject to due process if deprived.

Additionally, this Court has set a precedent that when there is a statutory ambiguity, the favor should be given to the veteran, and not the government. *See Brown v. Gardner*, 513 U.S. 115, (1994). As part of the statutory duty to assist, VA may provide a medical exam or obtain medical opinion “when such an examination or opinion is necessary to make a decision on the claim”. 38 U.S.C. §5103A(d)(2). The “mandatory” exam for post-surgical transplant is codified

under 38 C.F.R. § 4.115b, a federal administrative regulation under the VA's rulemaking authority, and is subject to be interpreted in the pro-veteran canon scope.

Furthermore, Congress has also adopted the pro-veteran canon and codified this practice into the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), under 38 U.S.C. §5103(b), which states "...When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant". Here, in VA rating decision on December 20, 2022, VA did not list any medical evidence they used to determine how they believe the petitioner warrant the minimum rating of 30 percent; it is clear the 30 percent evaluation was provided for administrative convenience without medical evidence. When there is an absence of both positive and negative evidence, even if VA disregarded Mr. Hale's statement provided during BVA hearing, it is reasonable to conclude that the benefit-of-doubt rule under §5103(b) should apply and the rating decision was erroneous. Therefore, by ignoring evidence provided by the petitioner claiming religious reason for being unable to attend a C&P exam that was not necessary nor legally required for VA to make a rating decision, VA has violated the religious neutrality and pro-veteran canon, thus § 4.115b was unconstitutionally applied to the petitioner by the VA.

II. THE BOARD'S REFUSAL TO REVIEW THE HYPERLINKED VIDEO IDENTIFIED BY THE VETERAN VIOLATED ITS DUTY TO CONSIDER ALL RELEVANT EVIDENCE.

This case presents a focused but consequential question: whether the Department of Veterans Affairs may disregard digital evidence that a veteran has clearly identified and made part of the record. The answer is unequivocally no. Under the long-established pro-veteran canon, any interpretive doubt or procedural ambiguity in the administration of benefits must be resolved in

favor of the veteran. That principle, embedded in both statute and precedent, requires the VA to err on the side of inclusion, not exclusion, when evidence is clearly identified and accessible.

When Petitioner Mark Scout recited a specific URL during his Board hearing, and testified that the video “will tell you everything you need to know to be able to grant my claim,” he fulfilled every obligation the law imposes on a claimant: he identified the evidence, pinpointed its location, and placed it squarely within the administrative record. J.A. at 29.

The Board refused to review the video, reasoning that a hyperlink is not a “document.” That refusal was legal error. Under 38 U.S.C. §§ 5103A, 5107(b), and 7104(a), and controlling precedent, once a veteran identifies evidence that predates the decision, is within VA’s control, and bears a reasonable connection to the claim, the Board must consider it. See *Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021); *Lang v. Wilkie*, 971 F.3d 1348 (Fed. Cir. 2020); *Conyers v. McDonough*, 91 F.4th 1167 (Fed. Cir. 2024); *Varad v. McDonough*, 37 Vet. App. 198 (2024).

Here, the Board’s conduct falls squarely within the type of error these authorities prohibit. The video existed months before the Board’s July 2023 decision and was expressly identified by Mr. Scout during his May 2023 hearing, where he recited its precise URL into the record and explained that it contained his treating practitioner’s presentation on the naturopathic methods underlying his care. J.A. at 29. By doing so, he provided all the information necessary for VA to access the evidence with minimal effort.

Yet the Board categorically refused to view it, asserting that hyperlinks are not “documents.” That position cannot be reconciled with the constructive-possession doctrine recognized in *Euzebio* and reaffirmed in *Varad*. Once a veteran clearly identifies and locates

evidence relevant to his claim, VA must “make reasonable efforts to obtain and review it.” *Varad*, 37 Vet. App. at 205–06. The Board’s failure to do so here deprived Mr. Scout of the full and fair consideration that the statutes and this Court’s precedents demand.

A. The Constructive Possession Doctrine Required the Board to Review the Hyperlink.

The doctrine of constructive possession ensures that the Department of Veterans Affairs decides claims on a complete and fair record, not one artificially narrowed by administrative formality. The constructive possession doctrine acts as a safeguard to make sure that all documents that should reasonably be part of a veteran’s claim are considered within the administrative record, rather than leaving out relevant materials due to procedural or administrative technicalities. See *Conyers*.

That safeguard is rooted in the statutory duty to assist, which is a very well-known foundational feature of the veterans’ benefits system. Congress designed VA adjudication to be “non-adversarial” and “pro-claimant,” placing an affirmative duty on the Secretary to develop the record once the claimant has presented a plausible case. *Murphy v. Derwinski*, 1 Vet. App. 78 (1990). Therefore, when a veteran submits evidence sufficient to make a claim “well grounded,” the Secretary “is obligated under § 3007(a) to assist such a claimant in developing the facts pertinent to the claim.” *Id.* The duty to assist, as emphasized in *Murphy*, applies to *all relevant facts*, “not just those for or against the claim” *Id.* This statutory duty is reinforced by the pro-veteran canon, which requires that interpretive and procedural ambiguities in veterans’ benefits law be resolved in the veteran’s favor. Together, these principles ensure that VA adjudication remains faithful to its purpose to providing veterans the full and fair consideration their service has earned.

That principle, articulated in *Murphy*, forms the statutory and doctrinal foundation of constructive possession. As *Murphy* made clear, the duty to assist is “more than a matter of policy or executive discretion; it is mandated by statute.” *Id.* Once a claimant identifies relevant evidence and explains its connection to the claim, the Secretary’s obligation to obtain and review that material becomes affirmative and mandatory.

The rationale in *Murphy* should extend naturally to any evidence that VA can readily access once clearly identified by the claimant. The duty to assist depends not on the location of the evidence but on its substance, whether it contains information relevant to the claim and can be obtained by VA through reasonable effort. This interpretation is consistent with the modern understanding of constructive possession, which obligates VA to consider all materials that could reasonably be expected to form part of a veteran’s claim. *See Conyers.*

Here, once Mr. Scout identified a specific YouTube video by URL and testified to its direct relevance to his claim, VA had both notice and effortless access to the evidence. Under *Murphy*’s duty-to-assist principle and the constructive-possession doctrine that evolved from it, the Board’s refusal to review that material was not a matter of discretion, it was a blatant legal error.

1. The Three-Part Test Governing Constructive Possession

The constructive-possession test, as articulated and consistently applied in *Varad*, *Euzebio*, and *Lang*, identifies three elements that determine when evidence, though not physically in the claims file, must nonetheless be considered part of the record:

1. Pre-existence – the evidence must predate the Board’s decision;
2. Control – the evidence must be within VA’s control or constructive knowledge; and

3. Relevance and Connection – the evidence must be relevant and reasonably related to the claim.

These elements ensure that the Board fulfills its statutory duty to base decisions “on the entire record of proceedings and upon consideration of all evidence and material of record.” 38 U.S.C. § 7104(a). They also give practical effect to the duty to assist under § 5103A, which requires VA to make reasonable efforts to develop the record once a claimant has identified pertinent evidence.

Each element serves a distinct purpose. The pre-existence element limits the doctrine to evidence that existed at the time of the Board’s decision. The control element ensures that VA cannot avoid responsibility for material it can access through ordinary effort or that is reasonably within its knowledge. Furthermore, the relevance and connection element, as explained in *Euzebio*, requires that the evidence “tends to prove or disprove a material fact” or reasonably clarifies an issue before the Board.

Together, these requirements give full meaning to Congress’s mandate that VA decisions be made on a complete record, not one constrained by administrative convenience or technological formality. The constructive-possession doctrine therefore operates as a safeguard to ensure that the non-adversarial, pro-claimant nature of the VA system is fully realized.

Each element is met in this case. During his May 2023 hearing, Mr. Scout recited a precise YouTube URL into the record and explained that it contained his treating practitioner’s presentation describing the methodology and clinical data supporting his care. J.A. at 29. That sworn testimony was transcribed and became part of the official record before the Board, satisfying the pre-existence requirement. *Euzebio* makes clear that once evidence predating the Board’s decision is “reasonably connected to the claim,” it must be treated as part of the record.

The control element is equally clear. Once transcribed into the hearing record, the URL and its explanation were within VA's constructive knowledge and direct reach. Under *Lang* and *Varad*, constructive possession extends to all evidence that the Secretary can access with reasonable effort or that could be expected to form part of the record. The agency cannot escape its duty by refusing to open a hyperlink expressly identified by a claimant. This case requires no speculation, investigation, or external search; the evidence was pinpointed and readily available.

The third element, relevance and connection, goes to the heart of the Board's legal error. The Board reduced Mr. Scout's disability rating on the ground that his practitioner's report "lacked a medically sound or clinically informed basis." J.A. at 23. Yet the excluded video provided that very explanation, the practitioner's own description of his qualifications, methodology, and supporting data. Under *Conyers v. McDonough*, 91 F.4th 1167 (Fed. Cir. 2024), the correct standard is whether the evidence is relevant and reasonably connected to the claim, not whether it bears a "direct relationship." The video plainly met that standard: it addressed the precise issue on which the Board bases its adverse decision.

By refusing to review the video, the Board ignored clearly identified, relevant, and readily accessible evidence, which is precisely what the constructive-possession doctrine forbids. Under *Euzebio* and *Conyers*, evidence is constructively before the Board when it is relevant, reasonably connected to the claim, and "reasonably expected to be part of a veteran's claim". The Board's own decision made the practitioner's methodology a material fact in dispute, yet the excluded video contained the practitioner's detailed explanation of that very methodology. It was not cumulative or collateral; it was indispensable to resolve the issue the Board itself raised.

Mr. Scout did everything the law requires. He identified the evidence, provided its precise location, and explained its importance. Once that occurred, the Board's duty to review it was

automatic under 38 U.S.C. §§ 5103A and 7104(a). Its refusal to do so was not a matter of discretion but a clear legal error that deprived the veteran of the full and fair adjudication Congress intended. The constructive-possession doctrine exists to prevent exactly this kind of evidentiary gap, where relevant, accessible evidence is excluded not by law, but by administrative formality.

B. *This Case is Distinguishable from Bowey v. West, 11 Vet. App. 106 (1998).*

The Secretary may attempt to rely on *Bowey v. West*, 11 Vet. App. 106 (1998), to argue that VA adjudicators are not required to seek out evidence referenced but not physically attached to the record. That argument misreads both *Bowey* and the doctrine it applies. *Bowey* involved expert medical opinions that generally referred to unspecified scientific treatises, requiring the agency to conduct an open-ended search for unidentified research materials. The Court held only that it would be unreasonable to expect VA to “investigate, gather, and consider” such diffuse sources without clear identification. *Id.*

This case is nothing like *Bowey*. Mr. Scout did not ask VA to conduct a broad or speculative investigation. He identified a single, specific piece of evidence, a video by its exact URL, provided it under oath during his Board hearing, and explained its direct relevance to his claim. J.A. at 29. Accessing that evidence required no “investigation” or “search” of any kind; it required only that the Board click or enter the link included in the official hearing transcript.

Indeed, *Varad* recently confirmed that *Bowey* addresses only the reasonableness element of constructive possession, not the control or relevance prongs. 37 Vet. App. at 207–08. The *Bowey* Court’s concern was about imposing on VA the duty to locate materials that were “not reasonably expected to be part of the record,” not about relieving VA of its obligation to consider evidence that has been precisely identified and made part of the record. *Id.*

Here, the record before the Board already contained the relevant link and explanation, satisfying every element of the constructive-possession test. Unlike the speculative materials in *Bowey*, the video in this case was both specifically identified and immediately accessible. The Secretary's reliance on *Bowey* therefore fails as a matter of law.

In sum, the constructive-possession doctrine and the duty to assist required the Board to review the evidence that Mr. Scout clearly identified, precisely located, and incorporated into the record. The YouTube video pre-existed the decision, was within VA's control, and was directly relevant to the issue before the Board. Its exclusion was not a mere procedural oversight but a legal error that denied the veteran the full and fair adjudication guaranteed by statute.

It is also deeply ironic that, in an age when nearly every communication from VA, including in its own decision letters, online forms, and claimant portals, contains embedded hyperlinks to supporting materials, the Board refused to open a hyperlink offered by a veteran to substantiate his claim. The agency cannot embrace technology to facilitate its own processes while rejecting it when used by the very claimants the system was designed to serve. The law, and common sense, demand consistency. When a veteran identifies relevant digital evidence and places it squarely in the record, the Board's duty is simple: click the link, review the content, and decide the case on the entire record as the statute requires.

III. THE BOARD'S ERROR WAS PREJUDICIAL BECAUSE THE EXCLUDED EVIDENCE DIRECTLY BEARS ON THE OUTCOME OF THE CLAIM.

The Board's failure to review the YouTube video was not harmless. Under 38 U.S.C. § 7261(b)(2), this Court must "take due account of the rule of prejudicial error." That rule requires

reversal or remand when an error affects the essential fairness of the adjudication or could have influenced the outcome. *Tadlock v. McDonough*, 5 F.4th 1327 (Fed. Cir. 2021).

The Board's refusal to review the video clearly meets that standard. The excluded evidence went to the core rationale for the Board's decision, the alleged lack of a "medically sound or clinically informed basis" for the practitioner's opinion. J.A. at 23. The video that Mr. Scout identified contained that practitioner's detailed explanation of his methodology, qualifications, and supporting clinical data. J.A. at 29. By ignoring this evidence, the Board relied on an incomplete record to justify a rating reduction.

A. *Tadlock* Confirms That the Error Was Prejudicial.

In *Tadlock v. McDonough*, 5 F.4th 1327 (Fed. Cir. 2021), the Federal Circuit made clear that the Veterans Court cannot deem an error harmless by hypothesizing what the Board might have concluded on a more complete record. The court explained that "it is the Board that is required to make the relevant factual findings in the first instance," and an appellate tribunal "may not make findings of fact in the first instance or weigh evidence." *Id.* Thus, where the Board fails to consider relevant evidence, neither the Secretary nor this court may fill that gap by speculation, the prejudice lies in the lost opportunity for factual review. *Id.*

That principle applies with even greater force here. The Board's sole justification for reducing Mr. Scout's rating was its finding that his treating practitioner's report "lacked a medically sound or clinically informed basis." J.A. at 23. Yet the excluded YouTube video contained precisely what the Board claimed was missing, the practitioner's own explanation of his methodology, qualifications, and supporting data. Far from being cumulative or tangential, the video went to the very heart of the disputed issue: the medical soundness of the practitioner's opinion.

By refusing to review that video, the Board deprived itself of the only direct evidence capable of addressing its stated concern. The omission therefore cannot be dismissed as harmless. Under *Tadlock*, appellate tribunals may not speculate about what the Board might have concluded had it considered the missing evidence; it is the Board, not this court, that must weigh such evidence in the first instance. Since the Board never saw or evaluated this critical material, there is no lawful basis to deem the error harmless. The prejudice lies in the loss of the factual review that Congress entrusted exclusively to the Board under 38 U.S.C. § 7104(a).

B. *Runions* Reinforces that Omitting Favorable Evidence Frustrates Judicial Review.

The Veterans Court's recent decision in *Runions v. Collins*, No. 24-4275, 2025 WL 1805555 (Vet. App. July 1, 2025), underscores the same principle. In *Runions*, the court vacated a Board decision that failed to discuss corroborating lay statements and articles supporting the veteran's credibility regarding herbicide exposure. The court held that without addressing this favorable evidence, it could not review the Board's credibility determination or conclude that the omission was harmless. *Id.*

The same logic applies here. The Board's silence on the video evidence, testimony that directly corroborated Mr. Scout's claim and addressed the precise rationale for the rating reduction frustrates judicial review and precludes the finding of harmless error. As in *Runions*, the prejudice is both procedural and substantive: the Board's failure to consider clearly identified, favorable evidence deprived the veteran of a meaningful factual and credibility assessment.

Consistent with 38 U.S.C. §§ 5103A and 7104(a), and as reaffirmed in *Tadlock* and *Runions*, the omission of material, outcome-relevant evidence from the Board's analysis violates VA's duty to provide a full and fair review. Remand is therefore required.

This case presents no novel procedural puzzle. It presents a simple but vital question: whether the Department of Veterans Affairs may ignore relevant evidence that a veteran has clearly identified, precisely located, and incorporated into the record merely because it appears in digital form. The law answers unequivocally: **IT MAY NOT.**

The constructive-possession doctrine exists to prevent precisely the kind of error that occurred here. Once Mr. Scout identified a specific YouTube video by URL and testified to its relevance, the evidence was constructively before the Board. The governing statutes, 38 U.S.C. §§ 5103A and 7104(a), and controlling precedent, *Murphy*, *Euzebio*, *Lang*, *Conyers*, and *Varad*, required the Board to review it. Its refusal to do so not only violated that duty but also deprived the veteran of the full and fair adjudication Congress intended.

That error was not harmless. The excluded video addressed the precise rationale the Board relied upon to reduce Mr. Scout's rating, the supposed lack of a medically sound foundation for his practitioner's opinion. Under *Tadlock*, this Court cannot hypothesize what the Board might have concluded had it seen the evidence, nor can it excuse an omission that foreclosed factual review. *Runions* reinforces the same rule: when the Board ignores favorable evidence that could alter its credibility or factual findings, remand is required.

In an age when the VA itself communicates with veterans through hyperlinks, online portals, and digital correspondence, it is both ironic and indefensible for the agency to reject evidence merely because it requires "clicking a link." Administrative convenience cannot override statutory duty. A veteran who has done everything the law requires, identifying the evidence, pinpointing its location, and placing it within the record, is entitled to a decision based on the entire record, not one artificially truncated by technological formalism.

CONCLUSION

For these reasons, the Court should vacate the Board's decision and remand the case with instructions that a) temporarily restore petitioner's service-connected renal dysfunction to previous rating and identify a least restrict means exist to accommodate the petitioner's religious practice to evaluate his GFR level; b) the Board must review and consider the video evidence identified by Mr. Scout in accordance with 38 U.S.C. §§ 5103A and 7104(a), and the precedents of *Euzebio*, *Varad*, *Tadlock*, and *Runions*. Only by doing so can VA fulfill its statutory promise of a non-adversarial, pro-claimant adjudication based on all pertinent evidence of record.