JURISDICTION

Mr. Mattingly appealed the judgment of the Court of Appeals for Veterans Claims under 38 U.S.C. § 7292(a). This Court has jurisdiction to review a Veterans Court decision "on a rule of law or of any statute or regulation . . . that was relied on by the Court."[1] Mr. Mattingly presents only questions of law.

In 2015, he filed an appeal under the legacy VA appeals system. That appeal remains ongoing. But because the VA issued Mr. Mattingly a subsequent rating decision—after the new Appeals Modernization Act (AMA) effective date, the VA decided that the AMA applied to his case. So, it shifted Mr. Mattingly's case into the AMA without his consent. Under the AMA, he was denied the right to submit new evidence when his appeal returned to the Board. The Veterans Court affirmed.

The Veterans Court was wrong to allow the VA to shift Mr. Mattingly's legacy appeals into the AMA without his consent. Doing so contradicted the AMA's plain text and the VA's regulations and manuals.

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[1] 38 U.S.C. § 7292(a), (c); *see also Moore v. Shinseki*, 555 F.3d 1369, 1371 (Fed. Cir. 2009).

This Court has jurisdiction under 38 U.S.C. § 7292 because Mr. Mattingly challenges the Veterans Court's decision only on a rule of law.

ISSUES ON APPEAL

Congress and the VA overhauled how the VA processes claims effective February 2019. At the time, many VA claims and appeals were being processed and at various stages of the agency's litigation cycle. The old scheme—legacy—guaranteed more due process rights than the AMA. Under the AMA, for example, the Board does not consider evidence after the rating decision if the veteran selects the direct review lane. The VA moved many veterans' ongoing appeals from the legacy to the AMA scheme against the veterans' wishes, thus stripping them of significant due process rights. Mr. Mattingly is one of those veterans.

This appeal asks the Court whether the VA may strip veterans of their legacy due process rights by denying a claim and then, after the AMA's enactment, granting only a part of the claim, forcing the parts of the appeal that remained denied into the unfavorable AMA scheme. It also asks whether, within the AMA,

the VA can reject evidence submitted with an appeal in which the veteran simultaneously chose the direct review lane.

STATEMENT OF THE CASE

This appeal arises from the Board's April 2020 decision denying Mr. Mattingly a rating higher than 10% for his migraines and refusing to consider the evidence he submitted for his claim.

FACTS AND PROCEDURAL HISTORY

Mr. Mattingly became a Marine in December 1993 and served until September 1995 on active duty.[2] He worked in aircraft ordnance and was exposed to munitions detonation and jet-engine noise.[3] In February 2011, the VA granted him service connection for tinnitus.[4] Because of his tinnitus, he began to experience migraine headaches.

Mr. Mattingly filed a claim for headaches in 2015.[5] He appealed after the VA denied his claim in an August 2015 rating decision.[6]

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[2] Appx1778.
[3] Appx2153-2157 at Appx2154.
[4] Appx2143-2145.
[5] Appx1440-1442.
[6] Appx1391-1394, Appx1168-1169, Appx996-997.

The AMA became effective in February 2019.[7] Under it, claimants—like Mr. Mattingly—who had received a decision under the legacy system would stay in that system. But all other cases would fall under the AMA.[8] Claimants with legacy claims could also "opt into" the AMA at various points.[9]

Under the AMA, veterans can choose one of three lanes at the Board: 1) the Direct Review docket, an accelerated lane where the Board may not consider any evidence that was not before the AOJ; 2) the Evidence docket, where the Board can consider all evidence claimants submit within 90 days of their NOD; and 3) the Hearing docket, in which the Board may consider evidence submitted by the veteran and also the veteran's evidence and testimony at a hearing.[10]

The AOJ granted Mr. Mattingly's headaches claim in September 2019 with a 10% rating and a June 9, 2015, effective

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[7] 38 C.F.R. § 19.2(a).
[8] 38 C.F.R. § 3.2400.
[9] 38 C.F.R. § 3.2400(c).
[10] VA M21-5, 4.1.d.

date.[11] Along with the decision, the VA told him how to appeal.[12] But the VA's instructions for appeal were limited to AMA procedures even though his headache claim was already decided under the legacy scheme.[13]

In a September 2019 Rating Decision, the VA rated Mr. Mattingly's headaches at 10% because a VA examiner misunderstood Mr. Mattingly's statements about how often he had headaches. The examiner thought Mr. Mattingly said he had one headache every two months; in fact, he has two headaches every one month.[14] Thus, Mr. Mattingly meets the criteria for a 30% rating because he has prostrating migraine headaches several times per month.[15] In his NOD, Mr. Mattingly explained that he had "bad headaches 2-3 times per month that I have to lay (*sic*) down on each time and miss some work for at times."[16]

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[11] Appx252-266.
[12] Appx262.
[13] Appx262.
[14] Appx265.
[15] 38 C.F.R. § 4.124a, DC 8100.
[16] Appx247.

He wrote to the Board again a month later to explain why he was entitled to at least a 30% rating: he experienced headaches two to three times per month, during which he had to lay down and miss work.[17] Severe prostrating migraine headaches two to three times per month would lead to a 30% rating.[18]

THE BOARD'S DECISION

Mr. Mattingly twice submitted evidence within 90 days of filing his NOD. But the Board denied a 30% rating after it found that "evidence was added to the claims file during a period when new evidence was not allowed."[19] The Board held that Mr. Mattingly was not allowed to submit more evidence—even in the 90-day period—because he had selected the "Direct Review Option" under the AMA, which does not allow a claimant to add evidence to the record after the claim goes to the Board.[20]

The Board discussed the 2019 VA examiner's finding that Mr. Mattingly's headaches occurred once every two months and

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[17] Appx236.
[18] Appx236, Appx247; 38 C.F.R. § 4.124a, DC 8100.
[19] Appx78-80.
[20] Appx78-79.

concurred with the VA's decision to rate Mr. Mattingly's headaches at 10%.[21] The Board refused to weigh the evidence that his headaches occurred two to three times per month.[22]

THE VETERANS COURT'S DECISION

Mr. Mattingly argued that the Board had violated its duty to consider all the evidence and sympathetically review his filings when it refused to consider his evidence about his headache frequency.[23] He also argued that because he received his initial rating decision in 2015, his case should have been adjudicated under the legacy system.[24] That error prejudiced him because the Board would have considered the evidence he submitted and granted him a 30% rating.[25]

But the Veterans Court confused an *issue* with a *claim*. And it held that the rulings in *Grantham v. Brown* and *Holland v. Gober* on jurisdiction over a "downstream" issue were dispositive in

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[21] Appx14-16 at Appx16.
[22] Appx14-16.
[23] Appx27-29.
[24] Appx30-31.
[25] Appx35-36.

determining when a legacy case must be shifted into the AMA.[26] The Veterans Court concluded that the VA properly considered Mr. Mattingly's appeal under the AMA.

It held that rating decisions issued after the AMA's effective date were initial decisions—even if they were subsequent decisions in a long-running appeal.[27] In this context, the Veterans Court never discussed the VA's duty to sympathetically review claimants' filings—particularly unrepresented claimants like Mr. Mattingly. The Veterans Court then agreed that the Board never had to consider the post-NOD favorable evidence and affirmed the Board's decision.[28]

ARGUMENT SUMMARY

Mr. Mattingly has been continuously appealing his claim since September 2015, when he received his initial decision. He should have remained in the legacy system, and the VA should have considered the evidence he submitted. And even if it considered his

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[26] Appx1-7 at Appx5-6; *Grantham v. Brown*, 114 F.3d 1156 (Fed. Cir. 1997); *Holland v. Gober*, 10 Vet. App. 433 (1997).

[27] Appx5-6.

[28] Appx7.

case in the AMA, the Board should have sympathetically reviewed his NOD. Given the evidence Mr. Mattingly filed with his NOD, the VA should have assumed he wanted the Board to consider it. At the least, it should have asked him what he wanted the Board to do with it.

The Veterans Court's reading of the statutes and regulation is wrong.

First, the Veterans Court conflated *claims* with *issues*, ruling that the VA correctly shifted Mr. Mattingly into the AMA because he received a decision on an issue in his claim after the AMA's effective date. But the AMA, by its plain language, applies to initial decisions on claims, not on issues—so it does not apply to Mr. Mattingly, who first got a decision on his claim for headaches before the AMA even existed. The cases the Veterans Court relied on—*Grantham* and *Holland*—distinguish issues from claims, and do not track the Veterans Court's conclusions.

Second, the VA ignored its duty to review Mr. Mattingly's communications sympathetically. His written communication conflicted with his actions—he elected the Direct Review docket

and simultaneously submitted evidence. Aware of the discrepancy, the VA should have asked Mr. Mattingly what he wanted or put him into the Evidence docket. Instead, it disregarded the evidence he sent in, which would have gotten him a higher rating percentage if the Board had considered it.

The Veterans Court's decision is legally flawed. It has deprived Mr. Mattingly of the benefits he is entitled to. The Court should reverse the Veterans Court's holdings and remand Mr. Mattingly's appeal to the VA for the Board to consider Mr. Mattingly's favorable evidence.

LEGAL QUESTIONS

Issues vs. Claims. VA claims comprise issues: service connection, rating, and effective date. This Court, the Veterans Court, and the VA have distinguished issues from claims. Did the Veterans Court incorrectly apply the law when it treated issues the same as claims?

Legacy Claims. 38 C.F.R. § 3.2400 defines AMA claims as those where the VA issued an initial decision on the claim after February 19, 2019. Legacy claims are those with initial decisions before that date. The VA first decided Mr. Mattingly's headaches claim in 2015. Did the Veterans Court err when it treated his subsequent 2019 decision on his headaches rating percentage issue as an initial decision on the claim?

Sympathetic Review. The VA is supposed to read pro se veterans' filings sympathetically. Mr. Matting simultaneously submitted favorable dispositive evidence at the same time he told the VA he did not want them to consider it. Should the VA have at least inquired about his contradictory selection? Or was it correct for the VA to choose the one path that ensured Mr. Mattingly would not be rated higher for his headaches?

ARGUMENT

Standard of Review. This Court reviews the Veterans Court's legal determinations de novo.

I. The Veterans Court erred when it held that a claim with an initial decision before the AMA began effective date could be an AMA claim without the veteran opting in.

Under 38 C.F.R. § 3.2400, what matters is whether the VA sent Mr. Mattingly an *initial* decision on his *claim* on or after the AMA effective date:

> "The [AMA] … applies to all claims . . . for which VA issues notice of an initial decision on or after the [AMA] effective date."[29]

The VA issued Mr. Mattingly an initial decision on his claim in 2015.[30] He appealed, and eventually, the VA partly granted it in a subsequent 2019 decision. It was not the initial decision on the claim, but it was the first time the VA assigned a rating percentage to Mr. Mattingly's migraines legacy claim. But in its 2019 decision, the VA kept denying him benefits by assigning him an incorrect rating percentage. So, Mr. Mattingly continued his appeal with new evidence. But the Board refused to consider the

[29] 38 C.F.R. § 3.2400(a)(1) (emphasis added).

[30] Appx1391-1394.

evidence because it thought he was in the AMA regime despite the VA's pre-AMA initial decision on his claim.

But the Veterans Court held that a decision on one *issue* within a claim shifts a legacy case into the AMA:

> Because this *issue* was first decided in the September 2019 rating decision issued after the AMA system went into effect, VA was required to process Mr. Mattingly's challenge to the initial 10% rating in the AMA system.[31]

In other words, the Veterans Court now holds that the 2019 rating decision is 1) in the legacy system for service connection and 2) in the AMA for the rating percentage. The VA bifurcated Mr. Mattingly's headaches claim and then treated Mr. Mattingly's appeal for the correct rating percentage as if it were a new claim for an increased rating. The Veterans Court was wrong to endorse the VA's treatment.

First, a claim is made up of issues. Though a veteran may appeal different issues in his claim at different times, the issues are just part of a claim. This Court has held that a claim, or case, encompasses the issues within it. "[A] veteran's overall claim, or

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[31] Appx6 (emphasis added).

case, for benefits comprises separate issues."[32] And the cases the Veterans Court erroneously relied on—*Grantham* and *Holland*—made that distinction.[33] Thus Mr. Mattingly's claim comprises the issues of service connection, level of compensation, effective date, and any other "downstream issues" that may arise in the claim.

Then, the Veterans Court relied on the regulation but substituted "issue" where the regulation says "claim." But an "issue" and a "claim" are materially different. Their difference controls this argument. The answer to whether the VA should switch a veteran into the AMA on a post-effective date initial decision on an "issue" or a "claim" is settled by reading the regulation's plain language:

> "The modernized review system … applies to all claims, requests for reopening of finally adjudicated claims, and requests for revision based on clear and unmistakable error for which VA issues notice of an initial decision on or after the effective date of the modernized review system."[34]

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[32] *Barrera v. Gober,* 122 F.3d 1030, 1032 (Fed. Cir. 1997).

[33] *Grantham v. Brown*, 114 F.3d 1156 (Fed. Cir. 1997); *Holland v. Gober*, 10 Vet. App. 433 (1997).

[34] 38 C.F.R. § 3.2400(a)(1) (emphasis added).

38 C.F.R. § 3.2400 does not waver—only initial decisions on *claims* are part of the AMA.

The Veterans Court erred when it held that despite an initial decision on a claim that precedes the AMA, a subsequent post-AMA decision on that same claim kicks a veteran into the AMA. The AMA applies to first decisions on claims, not subsequent decisions. Neither does it apply to decisions on issues within a claim. And because the VA sent Mr. Mattingly an initial rating decision on his claim in 2015, and it has never become final, his is still a legacy case.

a. The Veterans Court misinterpreted the law when it conflated "claim" and "issue."

The Veterans Court cited *Grantham* and *Holland* to conclude that the "September 2019 grant of service connection for migraines was a full award of the benefit sought in the legacy appeal initiated by the August 2015 legacy NOD,"[35] which then kicked Mr. Mattingly into the AMA.

[35] Appx6.

The Veterans Court is wrong. The VA never granted Mr. Mattingly the benefits he was entitled to because the VA assigned a 10% instead of a 30% rating for his headaches. Mr. Mattingly's appeal has always encompassed compensation level—just as all veterans' claims do. So, until the VA grants him an appropriate compensation level, his claim remains unsatisfied. His 2015 and 2019 NODs continued his original claim.[36]

And the Veterans Court's citations to *Grantham* and *Holland* are inapt. First, those cases are about Court jurisdiction, not what scheme a claim should be resolved under. Second, both support Mr. Mattingly's position that his 2019 decision was not an initial decision on a *claim*.

Grantham and *Holland* revolved around the Veterans Court's creation in 1988 and the resolution of cases that began before the Court's creation. *Grantham* dealt with whether the Veterans Court had jurisdiction to hear Grantham's claim.[37] This Court ruled that the Veterans Court had jurisdiction over Grantham's NOD, even

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[36] *See Barrera,* 122 F.3d 1030 at 1032.

[36] Appx1168-1169.

[37] *Grantham* at 1157.

though his claim began before the Veterans Court began.[38] The Court said that Grantham's NOD concerned an issue not addressed in the appeal stemming from an earlier NOD.[39] Thus, Grantham's second NOD, filed during the Veterans Court's existence, brought his issue under the court's jurisdiction. The *Holland* court also considered how the "down-stream" issues of effective date and compensation level achieve appellate status.[40] In both cases, the courts decided that decisions on "issues" gave the Veterans Court jurisdiction. But the relevant AMA regulation does not concern jurisdiction and is about claims, not issues within a claim.

The difference between a claim—in which a veteran asks for VA benefits—and an issue—which pertains to a specific part of a claim—was central to *Holland v. Gober*. Mr. Mattingly did not claim service connection alone. He claimed the benefits he is entitled to.

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[38] *Grantham* at 1158-1159.
[39] *Grantham* at 1158-1159.
[40] *Holland v. Gober,* 10 Vet. App. at 435-436.

The VA's regulations track. When the VA issues a decision, it considers all issues that are "reasonably within the scope of the claim," including ancillary benefits and "additional benefits for complications of the claimed condition."[41] So the VA decision encompasses all the benefits a veteran is entitled to on a claim.

Veterans file claims for benefits expecting that the VA will assign an appropriate rating and effective date. Those expectations are part of the claim. Even if they need to be explicitly decided for the Board and the Veterans Court to have jurisdiction to review them, issues like effective date and compensation level are always part of a veteran's claim in the VA's decision. So, when the VA denied Mr. Mattingly service connection for his headaches in 2015, it denied him a compensable rating and an appropriate effective date. And that is how the VA often treats claims.

When the VA decides an injury is service connected but assigns less than a full rating under the law, it will often simultaneously issue 1) a rating decision assigning a rating percentage and 2) a Statement of the Case denying and explaining why it didn't assign

[41] 38 C.F.R. § 3.155(d)(2).

a higher rating. An example of this is in Ms. DB's case found in the Appendix.[42]

Ms. DB claimed service connection for her interphalangeal joints injuries. In its decisions, the VA:

April 6, 2017	Denied service connection in a rating decision. Ms. DB appealed.
April 15, 2022	Granted service connection in a rating decision. Assigned a 0% rating.
April 15, 2022	Issued a Supplemental Statement of the Case denying a 10% or higher rating.

Ms. DB's claim was in the same procedural posture as Mr. Mattingly's, but while Ms. DB remained in the legacy scheme, Mr. Mattingly was forced into the AMA and its decreased due process. The VA should have provided Mr. Mattingly an SOC or SSOC for his migraines rating decision, or it should have continued his appeal in the legacy system. Either way, the Board would have considered his evidence and Mr. Mattingly would have gotten the 30% rating he is entitled to.

The distinction between an issue and a claim is essential because the AMA only applies when the VA issues an initial

[42] Appx2560-Appx2561.

decision on a *claim*. Here, the VA issued an initial decision on Mr. Mattingly's claim for migraine headaches in 2015—the subsequent 2019 decision was only the latest in a line of decisions on issues in the case.

b. Because the AMA only applies to VA initial decisions on *claims* after its effective date, the VA's 2019 decision could not force Mr. Mattingly into the AMA.

The Veteran's Court held that when the VA granted service connection for Mr. Mattingly's headaches, the other issues in the claim were shifted into the AMA.[43] The Veterans Court's holding means that the September 2019 decision is under both the legacy and AMA systems. But the VA's regulations do not support the Veterans Court's conclusions.

The VA defines an AMA claim under § 3.2400(a). Section 3.2400(a) excludes Mr. Mattingly's claim. Conversely, the VA includes his claim as a legacy claim under § 3.2400(b):

> a claim, or request for reopening or revision of a finally adjudicated claim, for which VA provided notice of a decision prior to the effective date of the modernized review system and the claimant has not elected to

[43] Appx6.

> participate in the modernized review system as provided in paragraph (c) of this section.[44]

So too with Mr. Mattingly. He made his claim in 2015 and got his first decision that same year—long before the AMA came into effect. And Mr. Mattingly did not elect to participate in the modernized review system. Rather, the VA mistakenly assumed that he should be in the AMA and then sent him forms where the only options to choose from all pertained to the AMA—without a legacy option. So, Mr. Mattingly sent an NOD and chose one of the AMA options.

But Mr. Mattingly's NOD was not a claim. The VA has defined a claim as "a written or electronic communication requesting . . . a specific benefit . . . submitted on an application form prescribed by the Secretary."[45] Mr. Mattingly's NOD was not on a form for making a claim. The VA also defined an initial claim under the AMA as "any complete claim . . . for a benefit on a form prescribed by the Secretary."[46] The regulation further explains that an initial claim is either "a new claim requesting service connection for a

[44] 38 C.F.R. § 3.2400(b).
[45] 38 C.F.R. § 3.1(p).
[46] 38 C.F.R. § 3.1(p).

disability or grant of a new benefit" or "a claim for increase in a disability evaluation rating or rate of a benefit paid based on a change or worsening in condition or circumstance since the last decision issued by VA for the benefit."[47]

Mr. Mattingly's 2019 appeal of his assigned rating does not fit into any definition of a new or initial claim found in the AMA or the VA's regulations. Nor does his 2015 NOD or his VA Form 9.[48] Only his claims form that led to the VA's 2015 decision meets the VA's definition of a "claim."[49] But the VA and the Veterans Court treated Mr. Mattingly's rating percentage appeal as a claim for increase.

Mr. Mattingly never filed a claims form or asked for benefits different from what the VA first decided in 2015. He continues to prosecute the same claim he filed in 2015: appropriate compensation for his migraine headaches. So, the VA's 2019 decision was not the first decision but just a subsequent decision on his longstanding claim.

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[47] 38 C.F.R. § 3.1(p).

[48] Appx1168-1169, Appx996-997.

[49] Appx1440-1442.

The VA's administrative procedures manual also shows that Mr. Mattingly's case should continue under the legacy system. The M21, the handbook for VA employees, defines a legacy appeal as stemming "from any decision (whether from original, new, or reopened claims, or SOCs/SSOCs) VA made before February 19, 2019."[50] Mr. Mattingly's appeal for appropriate compensation for migraines "stems from" the 2015 decision he got.

The Veterans Court held the VA appropriately processed Mr. Mattingly's appeal under the AMA based on its 2019 decision, which it contended settled his initial claim when it granted service connection.[51] But Mr. Mattingly claimed a benefit—and service connection is not a benefit even if it has become shorthand for VA disability benefits. It is one of the elements a VA claimant needs to prove to get VA disability benefits. So merely settling the issue of service connection cannot end a claim for a benefit.

The AMA's language, supporting regulation, pertinent case law, and the VA's M21-1 prove that the Veterans Court is wrong. Mr. Mattingly should never have been put into the AMA. By the law's

[50] VA M21-5, 4.3b.

[51] Appx6-7.

terms, his claim should have remained in the legacy system until he opted into the AMA voluntarily.

II. The VA failed in its duty to sympathetically review Mr. Mattingly's communications and curtailed his fair process rights.

Even assuming that Mr. Mattingly's claim was in the AMA, the VA should have clarified what he intended when he submitted evidence on the same NOD where he chose a lane in which he could not submit evidence.

When the VA issued its 2019 Rating Decision, it only sent Mr. Mattingly AMA forms. And when Mr. Mattingly sent his NOD back to the VA, he elected the Direct Review option, which does not allow the veteran to submit new evidence—*but on the NOD form* submitted new evidence about his condition.[52] He again submitted evidence to the Board in another letter a month later.[53]

Mr. Mattingly—an unrepresented layperson—was understandably confused by being switched abruptly from a

[52] Appx247.

[53] Appx236.

system he was familiar with to one foreign to him, whose rules confused him.

The VA must sympathetically review all appeal submissions from pro se claimants like Mr. Mattingly.[54] "The VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim... ."[55] This duty exists because the VA claims system is "paternal"; the Board must sympathetically develop claims to their optimum before deciding them.[56]

When the Board received Mr. Mattingly's NOD along with the evidence he submitted, it should have either 1) protected his rights by shunting Mr. Mattingly into the evidence docket since it was clear that he wanted the Board to consider his evidence; or 2) contacted Mr. Mattingly to find out what he wanted. It did neither of those things. Instead, it chose the least favorable election possible, and then it ignored a second letter from Mr. Mattingly with more evidence about his case.

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[54] *Comer v. Peake,* 552 F.3d 1362, 1369 (Fed. Cir. 2009).
[55] *Comer,* 552 F.3d at 1369.
[56] *McGee v. Peake*, 552 F.3d 1352, 1357 (Fed. Cir. 2008).

The VA knew Mr. Mattingly still had evidence to submit to the Board—because he submitted it along with his docket election form. But rather than figuring out what Mr. Mattingly wanted, or at least shifting him into the evidence docket, the VA shifted him into the direct review docket, where it knew the Board would not consider his evidence. That violated the VA's duty to sympathetically review claimants' filings and Mr. Mattingly's fair process rights.

Fair process rights "stem[] not from the U. S. Constitution but from the very nature of the non-adversarial VA adjudication system."[57] Fair process principles require the VA to operate in an impartial, unbiased, and neutral matter. In this context, fair process rights mean that the VA had to have a legitimate reason to ignore that Mr. Mattingly was confused and trying to submit evidence along with his review election form. The VA had no legitimate reason to assume Mr. Mattingly was not asking to have his evidence considered. At the least, it should have asked him what his contradictory communications meant.

[57] *Austin v. Brown,* 6 Vet. App. 547, 552 (1994).

Like many VA claimants, Mr. Mattingly was unrepresented at the agency and Board levels of adjudication and only had representation before the Veterans Court. The VA shifted the 5-year-old legacy appeal of an unrepresented veteran into a system with new and unfamiliar rules. And when he submitted contradictory communications, the VA did not ask him what he wanted but put him into the docket that was the least helpful for him. That action was unfair and violated Mr. Mattingly's fair process rights.

III. The VA's choice to ignore evidence that proves Mr. Mattingly should be rated higher for his headaches was prejudicial to his claim.

The VA wrongly transferred Mr. Mattingly's case into the AMA, which did not allow Mr. Mattingly to submit new evidence to support his claim at the Board level. As a result, the VA did not consider the evidence that Mr. Mattingly suffers from severe headaches several times per month. If it had, it would have granted Mr. Mattingly a higher rating. The VA's mistake has cost Mr. Mattingly the benefits he is entitled to.

Mr. Mattingly's current rating for headaches is 10% under

diagnostic code 8100.[58] That diagnostic code assigns a 10% rating for headaches occurring "with characteristic prostrating attacks averaging one in 2 months over last several months."[59] But as Mr. Mattingly told the Board, he experiences prostrating attacks several times per month.[60] According to Diagnostic Code 8100, Mr. Mattingly's symptoms merit a rating of 30%, not 10%.[61] And that is how he would be rated now if the VA had not unlawfully shoe-horned him into the AMA so the Board wouldn't have to read his testimony. Even if Mr. Mattingly had opted into the AMA, if the Board had just asked him if he wanted it to consider his new evidence—or even just considered his evidence submitted in the 90 days—Mr. Mattingly would be rated 30%.

The VA's mistake cost Mr. Mattingly the benefits he is entitled to.

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[58] Appx264-266.
[59] 38 C.F.R. § 4.124a, DC 8100.
[60] Appx247.
[61] 38 C.F.R. § 4.124a, DC 8100.

CONCLUSION

When Mr. Mattingly appealed the VA's erroneous compensation level assignment for his migraines, he did so under the legacy appeals system. He should have stayed there.

The Board's and the Veterans Court's interpretation of the AMA and its supporting regulation contradicts the plain text of those documents: Mr. Mattingly's claim is unambiguously a legacy claim. The Veterans Court confused an issue with a claim and wrongly concluded from *Grantham* and *Holland* that the VA's 2019 rating decision shifted Mr. Mattingly into the AMA. The VA's conclusion is misplaced because they define when an NOD places an issue—not a claim—into appellate status. The VA failed to review Mr. Mattingly's communications sympathetically or clarify what he wanted and instead excluded his dispositive evidence.

This Court should reverse the Veterans Court's errors of law and remand to the Board to consider Mr. Mattingly's evidence after holding that:

- When the VA issues a decision on a legacy claim, a decision on a downstream issue is not an initial decision on a claim

that shifts it into the AMA;

- Under 38 C.F.R. § 3.2400, *only* initial decisions on *claims* on or after February 19, 2019, are AMA claims; and
- When the VA receives evidence within 90 days of an NOD in which a veteran selected the direct review lane, it must either switch the veteran to the evidence docket or ask the veteran what he wants.

May 31, 2022 Respectfully submitted,

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