United States Court of Appeals for the Federal Circuit

ERNEST L. FRANCWAY, JR.,
Claimant-Appellant

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2018-2136

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-3738, Judge Michael P. Allen, Judge Amanda L. Meredith, Judge Joseph L. Toth.

Decided: July 23, 2019

WILLIAM H. MILLIKEN, Sterne Kessler Goldstein & Fox, PLLC, Washington, DC, argued for claimant-appellant. Also represented by MICHAEL E. JOFFRE.

WILLIAM JAMES GRIMALDI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by JOSEPH H. HUNT, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; LARA EILHARDT, SAMANTHA ANN SYVERSON, Y. KEN LEE, Office of General

Counsel, United States Department of Veterans Affairs, Washington, DC.

Before PROST, *Chief Judge,* LOURIE and DYK, *Circuit Judges.*

DYK, *Circuit Judge.*

Ernest L. Francway appeals from the Court of Appeals for Veterans Claims' ("Veterans Court's") decision affirming the Board of Veterans' Appeals' ("Board's") denial of Francway's claim for disability compensation. We affirm.

BACKGROUND

Francway served on active duty in the United States Navy from August 1968 to May 1970. While serving on an aircraft carrier in 1969, Francway contends that he was "hit by a gust of wind while carrying a set of wheel chocks" and "[t]he resulting fall caused him to injure his back." Francway Br. at 4. He contends he "was placed on bedrest for a week and assigned to light duty for three months following the incident." *Id.* Francway claims that this injury is connected to a current lower back disability, noting that after his accident he was treated for back problems while in service.

In April 2003, Francway filed a claim with the Department of Veterans Affairs ("VA") for service connection for his back disability. Between 2003 and 2011, Francway was examined multiple times by an orthopedist and had his medical records separately reviewed by the orthopedist and an internist. They concluded, along with a physician's assistant that examined Francway, that Francway's current back disability was not likely connected to his injury in 1969.

After multiple appeals to and from the Board and remands back to the VA regional office ("RO"), in 2013, Francway sought to open his claim based on new and

material evidence from his longtime friend, in a so-called "buddy statement," attesting to Francway's history of lower back disability after his injury in 1969. The Board again remanded the case to the RO based on the allegations in the "buddy statement," with instructions that Francway's "claims file should be reviewed by an appropriate medical specialist for an opinion as to whether there is at least a 50 percent probability or greater . . . that he has a low back disorder as a result of active service." J.A. 1046 (emphasis added). The Board also instructed that "[t]he examiner should reconcile any opinion provided with the statements from [Francway and his "buddy statement"] as to reported episodes of back pain since active service." *Id.* (emphasis omitted).

In 2014, Francway was examined by the same orthopedist who had examined him previously. The orthopedist concluded that Francway's current back symptoms were unlikely to be related to his injury in 1969, but the orthopedist did not address the "buddy statement." Subsequently, the internist who had previously provided the VA a medical opinion on Francway's disability reviewed Francway's file and the "buddy statement," and concluded that it would be speculative to say his current back symptoms were related to his earlier injury. The RO again denied Francway's entitlement to benefits for his back disability.

The Board concluded that there was insufficient evidence of a nexus between Francway's injury in 1969 and his current back disability and that the VA had complied with the earlier remand orders. Francway then appealed to the Veterans Court, arguing for the first time that the internist who had reviewed the "buddy statement" was not an "appropriate medical specialist" within the meaning of the remand order. The Veterans Court held that Francway had not preserved that claim because Francway did not challenge the examiner's qualifications before the Board.

Francway appealed to this court. We have jurisdiction pursuant to 38 U.S.C. § 7292(c). A request for initial hearing en banc was denied. *Francway v. Wilkie*, No. 18-2136 (Nov. 28, 2018), ECF No. 30. We review questions of law de novo, but, absent a constitutional issue, we "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

DISCUSSION

I

Since 2009, we have held that the Board and Veterans Court properly apply a presumption of competency in reviewing the opinions of VA medical examiners. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009).

Francway first contends that the presumption of competency is inconsistent with the VA's duty to assist veterans, *see* 38 U.S.C. § 5103A (requiring the VA to assist veterans with benefit claims), and the benefit-of-the-doubt rule, *id.* § 5107(b) (requiring the VA to give the benefit of the doubt to the veteran when the evidence is in approximate equipoise), and that there is no statutory basis for the presumption. We construe Francway's continued argument as to the illegitimacy of the presumption as a request for the panel to ask for an en banc hearing under Federal Circuit Rule 35 to overturn *Rizzo* and subsequent cases.[1] We decline to do so. We see no reason for en banc review since the "presumption of competency" is far narrower than

---

[1] "Although only the court en banc may overrule a binding precedent, a party may argue, in its brief and oral argument, to overrule a binding precedent without petitioning for hearing en banc. The panel will decide whether to ask the regular active judges to consider hearing the case en banc." Fed. Cir. R. 35(a)(1) (emphasis added).

Francway asserts and is not inconsistent with the statutory scheme.

"The purpose of the [VA] is to administer the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans." 38 U.S.C. § 301(b). In line with this mandate, the VA processes claims for service-connected disability benefits sought by veterans, *see, e.g.*, *id.* §§ 1110, 1131, and, to perform this duty, the VA relies on medical examiners who provide medical examinations and medical opinions based on review of the evidence in the record, *id.* § 5103A(d); 38 C.F.R. § 3.159(c)(4). Both the statute and implementing regulations require that these medical examinations and opinions be based on competent medical evidence, defined, in relevant part, as "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." 38 C.F.R. § 3.159(a)(1).

The presumption of competency originated in our decision in *Rizzo*. As we said in *Rizzo*, "[a]bsent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion." 580 F.3d at 1291. Although it is referred to as the presumption of competency, we have not treated this concept as a typical evidentiary presumption requiring the veteran to produce evidence of the medical examiner's incompetence. Instead, this presumption is rebutted when the veteran raises the competency issue.

The limited nature of the presumption has been consistently recognized in our caselaw. Beginning with *Rizzo*, we have held that "where . . . the veteran does not challenge a VA medical expert's competence or qualifications before the Board," the "VA need not affirmatively establish that expert's competency." *Id.* at 1291 (emphasis added);

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.