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Bufkin v. McDonough: Did Oral Arguments Signal Changes to CAVC's Scope of Review?

By Bradley W. Hennings[1] and Robert Chisholm[2]

11.0—Veterans' claims.

This article is an edited and annotated transcript of the December, 2024, Arguendo[3] *podcast about the recent oral arguments for* Bufkin v. McDonough*, a Supreme Court case that could significantly impact the scope of review[4] for veterans' court appeals.*

AMY KRETKOWSKI

In this podcast, we're going to discuss *Bufkin v. McDonough.* The case that was argued at the Supreme Court on October 16, 2024. Melanie

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[1] BA 1997 George Washington University, MS 2001 Stevens Institute of Technology, JD 2006 Rutgers University School of Law. Mr. Hennings joined Chisholm Chisholm & Kilpatrick as an attorney in January 2018 and currently serves as a Partner in the firm. His practice focuses on the U.S. Department of Veterans Affairs (VA) and the U.S. Court of Appeals for Veterans Claims. Immediately prior to joining CCK Law, Mr. Hennings served as a Veterans Law Judge at the U.S. Department of Veterans Affairs, Board of Veterans' Appeals (BVA). Mr. Hennings' full biography may be found at cck-law.com/lawyers/bradley-w-hennings. To learn more about CCK Law, the largest and most respected veterans law firm in the U.S., visit cck-law.com.

[2] BA 1984 Boston College, JD 1988 Boston University School of Law. Mr. Chisholm is a Founding Partner of Chisholm Chisholm & Kilpatrick, the largest veterans law firm in the U.S. His law practice focuses on representing disabled veterans in the United States Court of Appeals for Veterans Claims and before the Department of Veterans Affairs. As a veterans lawyer, Mr. Chisholm has been representing disabled veterans since 1990. During his extensive career, he has successfully represented veterans before the Board of Veterans Appeals, Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Federal Circuit. Mr. Chisholm is a founding member of the United States Court of Appeals for Veterans Claims Bar Association and served as President of that organization for the year 2002-2003. Mr. Chisholm served as the President of the National Organization of Veterans' Advocates from 1999 to 2004. In 2016, the United States Court of Appeals for Veterans Claims (CAVC) awarded Mr. Chisholm the Hart T. Mankin Distinguished Service Award in recognition of his 25 years of outstanding service to the Court. Mr. Chisholm has served as appellant's lead counsel in over 7,500 cases before the CAVC. His full biography may be found at cck-law.com/lawyers/robert-v-chisholm. To learn more about CCK Law, the largest and most respected veterans law firm in the U.S., visit cck-law.com.

[3] *Arguendo* is a veterans law podcast that analyzes oral arguments and trends at the U.S. Court of Appeals for Veterans Claims (Veterans Court), the U.S. Court of Appeals for the Federal Circuit, and the Supreme Court of the United States (SCOTUS). The podcast is hosted by Amy Odom of Chisholm Chisholm & Kilpatrick LTD and Amy Kretkowski of The Veterans Law Office of Amy B. Kretkowski PLC.

[4] A set of guidelines that an appellate court uses to determine if a lower court or tribunal made a mistake. In this case, it dictates how much deference the Veterans Court must give to the Board of Veterans' Appeals.

Bostwick of the Orrick firm[5] argued on behalf of the Petitioners and Sopan Joshi[6] argued on behalf of the government.

Amy [Odom] and I both have connections to this case.

We both co-authored amicus briefs in support of the Petitioner. Amy co-authored the better one, and I'm saying it's better because it got an honorable mention during the oral argument.

But even better than Amy's better writing was that Amy was there. She was in the room where it happened, there for the oral argument. So she's going to be able to give us some of the inside scoop on the vibes in the room.

AMY ODOM

It was vibey.

Well, mostly because this case involves the interpretation of 38 U.S.C. 7261(b)(1), which is the U.S. Court of Appeals for Veterans Claims' scope of review statute, and the specific question was, What did Congress want the Veterans Court to do when it said that the court shall "take due account of the Secretary (of Veterans Affairs)'s application of the benefit of the doubt rule"?

Congress clearly wanted the court to do something, and the parties just disagree on the nature of what is that something. Is it a factual question? Is it a question of law, or is it a mixed question of fact and law? The answer to that question, it seems, dictates the standard of review the Veterans Court will use.

AMY KRETKOWSKI

[5] Orrick, Herrington & Sutcliffe LLP
[6] Assistant to the Solicitor General

Yeah, that's right. So the Petitioner wants the question to be characterized as a question of law, which would therefore be subject to *de novo* review[7]. And the Petitioner also wants the Veterans Court to perform this analysis on its own, automatically, in every case, regardless of whether or not the question is presented by the appellant. So here's Melanie right out of the gate, followed by Chief Justice Roberts.

> MELANIE BOSTWICK/PETITIONER (RECORDING)
>
> Our view is that this is something the Veterans Court has to do in every case, that it is not bound by party presentation, and that it is a non-deferential review.
>
> CHIEF JUSTICE ROBERTS (RECORDING)
>
> But it's a pretty unusual law, right? It says that the administration shall “take due account of.”
>
> It doesn't seem that they're changing the legal standard at all. It just says sort of “be more careful,” and to take from that instruction some change in the legal standard of review, I think is quite a leap.

AMY KRETKOWSKI

This is an unusual law, but there's also an unusual court reviewing an unusually non-adversarial benefits scheme.

Mel explained that when Congress amended the statute, it didn't change the standard of review because that wouldn't fix the problem. She argued that the Veterans Court was supposed to be assessing the

[7] A "*de novo* review" means that a court will examine a case completely anew, as if it were seeing it for the first time, without giving deference to the decisions made by a lower court, essentially starting the legal analysis from the beginning.

secretary's application of the benefit-of-the-doubt rule all along, and that's what the *Gilbert* case[8] had said. But the court wasn't doing that, and so the VSOs complained to Congress. Congress then amended the statute to add this mandatory provision—as Amy said—to say that the Veterans Court, in reviewing the Board [of Veterans' Appeals] decision, shall take due account of the Secretary's application and the benefit of the doubt.

Justice Jackson tried to get a better handle on what the Veterans Court is actually supposed to do in these cases. Here's Justice Jackson.

> JUSTICE JACKSON (RECORDING)
>
> Can you be a little bit more specific when you say it was supposed to be the court—the Veterans Court—was supposed to be doing "that" all along. What exactly is the "that"?

AMY KRETKOWSKI

Good question! Mel explained the requirements of [38 U.S.C. §] 5107(b), that the agency has to consider all information—lay and medical evidence of record—and, when there's an approximate balance of positive and negative evidence on any material issue, the veteran gets the benefit of the doubt. The Veterans Court has limited its review in these cases to whether VA made a clear error of fact.

Mel's position is that the ultimate question here—reviewing whether the Secretary properly applied the benefit of the doubt—that ultimate question is a question of law, which would then be reviewed *de novo*. So here's Justice Jackson again, followed by Mel and then Justice Kavanaugh.

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[8] In *Gilbert v. Derwinski*, Jul 25, 1990, 1 Vet.App. 49 (1990), the Veterans Court held that a veteran is entitled to benefit of the doubt when there is approximate balance of positive and negative evidence.

JUSTICE JACKSON (RECORDING)

You say no deference should be given to … the administration, to the agency making that determination.

MELANIE BOSTWICK/PETITIONER (RECORDING)

That's correct. That is a question about whether it's a legal conclusion about the state of the evidentiary record. Was it sufficient to meet the applicable standard of proof. Here you have this kind of unique standard of proof—approximate balance—but like other standards of proof, the court should be reviewing it *de novo*.

JUSTICE KAVANAUGH (RECORDING)

Wouldn't you expect that Congress—if they thought that the standard of review was wrong—instead of saying "take due account," would have said review *de novo*?

AMY KRETKOWSKI

And that's another good question. Congress shoehorned this mandatory provision in between subsection A, dealing with the standards of review, 7261(a), that outlines the standards of review that the court is supposed to use, and 7261(c), which is a subsection that says Veterans Court can't be doing any trial *de novo*. But Congress, in its infinite wisdom, didn't provide any guidance on how the court is actually supposed to review the secretary's application of the benefit-of-the-doubt rule or what type of question this is. Congress didn't provide that information in the statute.

Justice Kagan seemed pretty set on this being a question of fact.

JUSTICE KAGAN (RECORDING)

Well, how could this not be a factual question? I mean, I could understand it if you were looking at a decision by the Secretary or the Board where they completely ignored the benefit-of-the-doubt rule or where they gave the benefit of the doubt to the wrong party. Then I can see you're saying, “well, look, they made a legal error, and that's subject to *de novo* review.” But assume that they do that. Assume that they just say, you know, we don't see that this case is in equipoise, so we're not giving the benefit of the doubt to the claimant. And then the court takes another look at it. I would think that what the court is doing is to evaluate how the board has evaluated evidence, weighed evidence, contrasted one party's evidence with another party's evidence, decided which is the more credible. All of that sounds like typical factual issues and factual determinations.

MELANIE BOSTWICK/PETITIONER (RECORDING)

There are certainly factual determinations underlying it, and we agree that the Board's assessment of credibility or persuasive value or probative value to any given piece of evidence should be reviewed deferentially, just like it is in other sufficiency-of-the-evidence challenges. But the ultimate question—that contrast between the parties’ evidence—that question is traditionally reviewed as a question of law...

AMY KRETKOWSKI

Justice Alito seemed to agree with Justice Kagan, but Mel held her ground.

JUSTICE ALITO (RECORDING)

I think it would be a mistake—it would be a legal error—if they said “we're disregarding the fact that the claimant was entitled to

the benefit of the doubt" in the proceeding before the administration. That would be a mistake in applying the applicable law. But if they apply the applicable law then what is the problem with reviewing the finding under the clear-error standard? Do you agree that that would be appropriate?

MELANIE BOSTWICK/PETITIONER (RECORDING)

I think that the finding is reviewed for clear error, but the application of the standard of proof is reviewed *de novo*. This is how sufficiency of the evidence works.

AMY KRETKOWSKI

Justice Sotomayor characterized the question as a mixed question of law and fact, and like several of the other justices, she emphasized the plain language of the statute and the words Congress did, and more importantly, did not use.

JUSTICE SOTOMAYOR (RECORDING)

They knew how to say it's a matter of law or it's a matter of fact and what standard of review applies, and they didn't use those words.

MELANIE BOSTWICK/PETITIONER (RECORDING)

But they didn't use "clear error" either, and they didn't put it under (a)(4), which is the standard of review for facts. I think that's a clear recognition that this is not a factual question or at least not purely a factual question to take.

JUSTICE SOTOMAYOR (RECORDING)

But there are components that are factual and components that are legal, and they take due consideration of the standard of review that applies to each.

MELANIE BOSTWICK/PETITIONER (RECORDING)

But just because something involves facts doesn't mean that the ultimate question is a question of fact.

AMY KRETKOWSKI

So the standard of review question really seemed to dominate the oral argument, and Mel raised up what I think is a pretty good point about the need for a more robust review by the Veterans Court of the Secretary's application of the benefit-of-the-doubt rule.

MELANIE BOSTWICK/PETITIONER (RECORDING)

Whatever the precise level of deference or scrutiny that is appropriate to take due account of the Secretary's application of this statute, it has to be some meaningful review, and that's the purpose of the Veteran's Court, right, is to superintend this one agency. If the Veterans Court is meaningfully looking at this benefit-of-the-doubt rule, then we will get a developed law. What does approximate balance mean? How does it apply in different cases? We will get uniformity, which we don't have now.

AMY KRETKOWSKI

Justice Kagan framed the benefit-of-the-doubt rule as a burden-shifting rule.

JUSTICE KAGAN (RECORDING)

Do you agree with the description of the benefit-of-the-doubt rule that it's essentially just a change in the burden of proof, right?

Usually, a claimant comes in and he has to meet a 51 percent burden, and what the benefit-of-the-doubt rule does is to say, No, if you meet 50 percent, you win and maybe even a little bit more, because it's an approximate balance. So maybe if you go 49 percent you win, but that's what this rule is. It's just a shift in the burden of proof.

MELANIE BOSTWICK/PETITIONER (RECORDING)

Yes, I'd say it's a different burden of proof, and I do want to be clear, it is not a 50 percent rule, it is not a preponderance rule. The Federal Circuit has rejected that it is broader than that.

JUSTICE KAGAN (RECORDING)

OK. So it's … like, even if you don't get up to 50 percent, maybe because we find that there's an approximate balance, you still win. But that's just … another way of shifting the burden of proof. That's what this rule is.

MELANIE BOSTWICK/PETITIONER (RECORDING)

Yeah, it's also that the burden remains on the claimant, but the level of the burden…—the threshold they have to meet—is different. It sort of creates three zones: persuasively favoring the veteran, veteran wins; persuasively against the veteran, veteran loses on that issue; and then this middle zone of approximate balance—

JUSTICE KAGAN (RECORDING)

Yeah. So why isn't that the way we usually do this? It's like … usually in like a totally factual case where you have all these subsidiary, factual findings and then you have a question of whose facts weigh more heavily, whose facts are more credible, and we

usually think about that, it's like, Was it clear error to find that the claimant didn't meet his 51 percent burden of proof? Now we just say is it clear error to find that the plaintiff didn't meet his slightly less stringent burden of proof. But it's still clear error.

AMY ODOM

So it sounds like Justice Kagan is really in the “this is a factual question” camp. Would you agree, Amy?

AMY KRETKOWSKI

Yes, absolutely. She's one that I would put, you know, definitely in the “fact” camp, which would mean, definitely on the side of the government.

AMY ODOM

Definitely “deferential review.”

AMY KRETKOWSKI

Very “deferential review,” very “clearly erroneous,” “the Board had to be higher than a kite when they made that decision,” “clearly erroneous standard over here.”

AMY ODOM

How did Justice Gorsuch put it? “They had to be out to lunch”?

AMY KRETKOWSKI

“Crazy! Crazy! Like, crazy!”

And we may or may not include that fight, but yes, that's later, we're almost there.

So Mel did push back on her argument that the Veterans Courts' benefit-of-the-doubt review should be more like a sufficiency-of-the-evidence review, and whether the evidence was sufficient is a question of law.

Justice Gorsuch seemed to agree with this approach.

> JUSTICE GORSUCH (RECORDING)
>
> So to take your example of the two experts. Let's say they're both super well qualified and they both do a really good job, and one says service related, the other says not. The agency favors the one that's "not" because he interviewed the claimant more recently in time or ran one more test.
>
> And that's not clearly erroneous, because the "clearly erroneous" standard is very hard to meet.
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> MELANIE BOSTWICK/PETITIONER (RECORDING)
>
> Yes, Your Honor.
>
> JUSTICE GORSUCH (RECORDING)
>
> Right, it's basically, Were they crazy in choosing this one fact over the other fact, and they were not crazy. So there's no clear error, but as a matter of law, you would say—as I understand your argument—that, Hey, those are really pretty similar, and the Secretary's decision that it wasn't "decisively in favor"—I think is the language you used, or something like that—"in favor of the government" means that this standard has teeth and should be applied.
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> MELANIE BOSTWICK/PETITIONER (RECORDING)
>
> Yes, Your Honor.

JUSTICE GORSUCH (RECORDING)

Okay.

AMY KRETKOWSKI

Justice Kavanaugh latched on to the “crazy” line.

JUSTICE KAVANAUGH (RECORDING)

Two things. I assume you don't want us to accept the premise that “clearly erroneous” is the same as “crazy,” as a general proposal.

MELANIE BOSTWICK/PETITIONER (RECORDING)

Correct, Your Honor. The way the Veterans Court has articulated it is, Is there a plausible basis?

JUSTICE KAVANAUGH (RECORDING)

And second, can you quantify or try to quantify, what approximate balance is?

MELANIE BOSTWICK/PETITIONER (RECORDING)

I think we're, in this case, not challenging the *Lynch* decision[9], and so it is just, Have you persuasively favored one side or the other—

JUSTICE KAVANAUGH (RECORDING)

Is that 35 (percent)? 40? 45? 49?

MELANIE BOSTWICK/PETITIONER (RECORDING)

[9] Lynch v. McDonough, 21 F.4th 776 (December 17, 2021).

I think that's a question that this Court doesn't have to resolve in this case.

AMY KRETKOWSKI

So my halftime nose count based on just this first part of the oral argument is, I'm going to say—at least I was thinking—that Justices Sotomayor, Gorsuch, and Jackson agree with Petitioner and Justices Roberts, Kagan, and Kavanaugh do not. I'm not sure about Justice Alito. I'm not sure about Justice Thomas. I think Justice Alito leans towards the Petitioner, just because I think he probably cannot bring himself to side with the government at all, ever, ever, ever.

Maybe the same thing for Justice Thomas? And I think Justice Barrett leans towards the government. But … I might change my opinion once we hear how Amy is going to cover the government's argument next.

AMY ODOM

Sure, but before I do that, I do want to point out that Justice Alito and Justice Thomas were more than happy to side with the government in *Rudisill*[10] … and in *George*[11] and *Arellano*[12]—all the veterans cases.

So on to the government's argument. The Solicitor General's office's attorney—representing the government—was Sopan Joshi, as you said, Amy. And apologies to Mr. Joshi because I'm sure I mispronounced his first name. But, by the way, did you know that it is tradition in the Solicitor General's office for the men to wear coattails?

AMY KRETKOWSKI

[10] Rudisill v. McDonough, 601 U.S. ___ (2024).
[11] George v. McDonough, 596 U.S. ___ (2022).
[12] Arellano v. McDonough, 598 U.S. 1 (2023).

No, I did not. No, I'm sorry, I did not know that until you said that when we were discussing this case. And that's why it's so awesome that you were in the room where it happened.

AMY ODOM

Right. I was in the room where it happened.

AMY KRETKOWSKI

Looking at them, squishing their coattails around, that's freaking awesome.

AMY ODOM

Right? I not going to throw away my shot to see this very important argument live before the nine “Supremist” Justices in the country. So, at first I thought, you know, like this guy's a little quirky, when I saw the coattails. But then the attorney representing the government in the next case—which was the San Francisco sewage in the Pacific Ocean case for those real Supreme Court junkies out there—he was also wearing coattails. It turns out it's a tradition, and according to Google, it's called a morning coat. The equivalent for women is smart day wear. You are wearing smart day wear right now because it's a sweatshirt that says Iowa Law.

AMY KRETKOWSKI

I am. This is very smart day wear.

AMY ODOM

But back to Bufkin. The government’s presentation really centered around those same two questions that seem to be in focus during the Petitioner’s presentation. One, does 7261(b)(1) do any work at all? Or does it just repeat what section (a)(4) tells the Veterans Court to do,

which is to review questions of fact under the clearly erroneous standard.

The second question that seemed to be the focus is whether the court's review of the Secretary's application of the benefit of doubt is a question of fact, a question of law, or a mixed question. Amy just talked at length about this, and like we were saying, the answer seems to control what the standard of review is under 7261(b)(1).

So starting with that first question, the government's pitch is that section (b)(1) really just repeats what (a)(4) already tells the Veterans Court to do: to review the Board's factual findings, including whether the evidence was in approximate balance under the clearly erroneous standard of review. They called it an "exclamation point" for (a)(4), but I think it's safe to say that most of the Justices agree that Congress did not pass section (b)(1) just for funsies.

Because (b)(1) wasn't in the original statute, like Amy K. was just saying. It didn't come around until, like, 2003, which was, you know, almost 20 years after the Veterans' Judicial Review Act.

Here's Justice Thomas.

> JUSTICE THOMAS (RECORDING)
>
> Well, in order for us to accept your argument, don't we have to accept that Congress passed a meaningless provision?
>
> SOPAN JOSHI/RESPONDENT (RECORDING)
>
> I don't think so, Justice Thomas.
>
> JUSTICE THOMAS (RECORDING)
>
> So what work is it doing?

AMY ODOM

And Chief Justice Roberts.

> CHIEF JUSTICE ROBERTS (RECORDING)
>
> I want to go back before you get off it. What other examples do you have of Congress passing a law that doesn't do anything?

AMY KRETKOWSKI

Can I just say that I think that was my favorite line of the whole oral argument. “What other examples do you have of Congress passing a law that doesn't do anything?” I thought that was fun.

AMY ODOM

Yeah, that was a very vibey moment in the courtroom. Everybody was giggling.

The Chief Justice also made the point that the reason we even have subsection (b)(1)—that “take due account of the secretary's application of the benefit of the doubt” language—is because the VSOs went to Congress complaining that the then-current version of 7261 wasn't doing enough to force the Veterans Court to make sure that VA was giving claimants the benefit of the doubt.

And if you accept the government’s construction of subsection (b)(1), what did Congress do in response? Nothing. Big, fat nothing. Just repeated what was already in the law

AMY KRETKOWSKI

My response to that—the whole notion that Congress did nothing in response or that all Congress did was put an exclamation mark on a pre-existing statute—to me is kind of a ridiculous argument.

AMY KRETKOWSKI

So when I was listening to the oral argument, it struck me that that notion that Congress just put an exclamation mark on this, that really sort of upset the Justices. I think they kind of jumped all over that in the government's section of the argument. It seemed to **** some of them off.

Amy, you'd have better insight into, you know, obviously, their body language and their facial expression. But they didn't seem to like the notion that Congress would just pass a law to punctuate an existing law, right?

AMY ODOM

Yeah, definitely, certainly the Chief Justice seemed a little skeptical. And here's Justice Jackson really driving that point home.

> JUSTICE JACKSON (RECORDING)
>
> But if the complaint was maybe there are times when a court is completely ignoring it, but what we really are worried about is that we're not actually getting it, that they're saying benefit of the doubt or whatever, but then when they're applying it, they are not actually giving us… They're not evaluating whether the evidence is in equipoise properly, when it is in equipoise, they're not giving it to us.
>
> In that circumstance, if that was the complaint, it seems odd that Congress would just come back and point to the benefit of the doubt rule as opposed to saying, We need a court that's actually policing the extent to which the administration is giving people what we said…

AMY ODOM

But there was one Justice in particular who was on board with what the government was offering, and that was Justice Kavanaugh. He seemed to disagree that it's a meaningless provision. And even if he agrees and any other Justices that agree with him—that it's not a meaningless provision—it doesn't mean that a majority of the court will agree that it requires the Veterans Court to actually do anything more than what subsection (a)(4) already requires. Like the government is pitching and Justice Kavanaugh seems to agree, it just adds an exclamation point telling the Veterans Court that they really, really, really, really, really, really, really mean it when they say, "review factual findings under clear error."

> JUSTICE KAVANAUGH (RECORDING)
>
> Seems to me the way you're describing it, it did something important, which was describing the practice, at least in some cases, by the Veterans Court where they weren't separately analyzing it in light of the benefit-of-the-doubt rule, and telling the Veterans Court, You need to take due account of the benefit-of-the-doubt rule. That is accomplishing something.

AMY ODOM

So I started thinking about it, because I keep getting turned around on this, because I agree there's no way that 7261(b)(1) is just a meaningless provision, and that was Congress' answers to the VSOs coming to them and saying, We need more. It's got to mean something. It's got to mean the Veterans Court has to do something more than what was already in (a)(4). That's what I think.

But one way that a majority could get to a holding that (b)(1) is just an exclamation point on (a)(4) is by holding that the Board's application of the benefit-of-the-doubt rule is a purely factual matter or a mixed

question of law, in fact, that is reviewed under the clearly erroneous standard.

Again, this is the government's pitch, and I think that there's really some good support for that, in this case, that came up in the briefing and on oral argument: *U.S. Bank v. Village at Lakeridge*[13]. That's the case from 2018, from the Supreme Court. In that case, though, it is held that if a finding involved mixed facts and law but is predominantly factual, it has to be reviewed for clear error, not *de novo*. And remember from the veterans advocates' perspective, we want *de novo* review because *de novo* review means no deference to the Board's findings as to whether the evidence was in approximate balance. And we've all seen these Board decisions [where] all they do … at the end is say, We find that the evidence does not persuasively sway this way or the other. Like, there's no real analysis there. And so the Veterans Court—if Petitioners were to prevail on this question—would be forced to do more of a searching review—which is actually, I think, some of the language that we saw in the legislative history—a *searching* review of the Board's application of the benefit of the doubt.

But here's Mr. Joshi explaining how the government thinks of *U.S. Bank v. Village at Lakeridge* works here.

> SOPAN JOSHI/RESPONDENT (RECORDING)
>
> I agree that the approximate balance standard is a legal standard. Of course it is. And you apply it to all of these historical facts that have been found: the expert evidence, the lay evidence, the medical evidence. That's the application of a legal standard to the facts and the record. That is a classic mixed question of law.
>
> And so then the question is, How do you review? How does a reviewing court review the fact-finder's mixed-question

[13] 583 U.S. 387 (2018).

> resolution? And the answer there, which has been given in case after case—*Village of Lakeridge* is probably a great example from a few terms ago—you ask, does answering that mixed question entail primarily factual work or primarily legal work? And here it is—clearly, I think—primarily factual.
>
> I mean it says "balance." That means assigning weights to different evidence and then putting them on the scales and seeing…

AMY ODOM

Well, Amy, I'll tell you who was not trying to hear any of that and that would be Justice Gorsuch and Justice Jackson. To them, ultimately, this is a question about the sufficiency of the evidence, which is traditionally reviewed *de novo*. This is where it gets really confusing for me because we even have case law in the Veterans Court that says that the sufficiency of the evidence is a legal question that's reviewed *de novo*. And one of them would be *Horn v. Shinseki*[14], which deals with the rebuttal standard for the presumption of soundness.

For those of you who are a little rusty on the presumption of soundness law: The veteran in most cases will be presumed to have entered service free of any defects. And if the VA wants to say, Well, in fact you did have this one defect, you had it prior to service, you didn't start in service, the government will have to show by clear and unmistakable evidence both that the thing actually did preexist service and that it clearly and unmistakably was not aggravated in service. And *Horn* says that those two questions—that when the court reviews the Board's findings on those two questions—they review at *de novo*. They defer to the factual findings—the underlying factual findings—such as, The veteran was hospitalized for psychiatric treatment prior to service, or

[14] 25 Vet. App. 231 (2012)

The veteran had, you know, more aggressive and more frequent delusions after entering service.

But the ultimate question of whether that alone shows clearly and unmistakably that the condition either pre-exists service or wasn't aggravated by service, the court will review that *de novo* without deference to the Board's finding on that particular issue.

AMY KRETKOWSKI

Looking at this as a sufficiency-of-the-evidence notion is, to me, very compelling. But then when I start to think about, OK, so how does this actually work? How do you actually review this? That's where it gets a little twisty, because in order to determine whether or not the evidence is sufficient, you necessarily have to look at these factual findings.

And if you're making this legal determination *de novo*, but being deferential on the factual findings, it gets a little confusing. It just gets a little confusing to me. I don't know how you weigh evidence without making your own factual findings. Right? I mean, there was a lot of back and forth about, you know, you take the non-clearly erroneous facts and you put them in one bucket, and the clearly erroneous facts… But you're only looking at the non-clearly erroneous facts... It's like, how do you actually do that?

It's going to be interesting to see how the Court comes out on this because I think it would be very easy to say this is, you know, it's a factual question. It's clearly erroneous. That's it. We're done.

I think the harder lift—and I think what Congress intended—was that it was going to be a harder, heavier lift … was for the court to actually review the Secretary's application of the benefit-of-the-doubt rule and determine, Did the Secretary really screw up when, in saying that the benefit-of-the-doubt rule didn't apply… Because you're absolutely right,

Amy, the Board issues these decisions where they just put this rubber-stamp language. They'll rattle off all the evidence, and they'll say the preponderance of the evidence, you know, or the benefit-of-the-doubt rule, is not for application. Done. And that's just annoying.

And you know, how is the court supposed to review the weighing of the evidence without getting into weighing evidence?

AMY ODOM

I mean, our court does it all the time with a presumption-of-soundness case. I mean, I'm sure you can find lots of… Besides *Horn*—and I can just tell you from my own experience—the easiest reversal to get in the Veterans Court is on a presumption of soundness or, you know, some other question where the burden is on the Secretary. Because then it becomes like, even if we accept all of the Board's findings, it does not meet the legal standard of clear and unmistakable evidence. And it does sound like more of a judgment call, but—kind of like "you know it when you see it"—but there are standards: it has to be undebatable, no reasonable minds would disagree that this, it wasn't aggravated or that it pre-existed...

So I think it's doable. It's a workable standard, you know, reviewing the sufficiency of the evidence *de novo*.

To me, the more difficult question is, Where is that line between, you know, legal to sort of not even purely legal? But, like, of course, they're all going to be questions of mixed facts and law, right? But *U.S. Bank* says the line is drawn when it's predominantly factual, then it's clearly erroneous.

AMY KRETKOWSKI

"What does that mean?!"

AMY ODOM

Yeah, right, exactly. I think, in *U.S. Bank*, the specific issue had to do with the bankruptcy case and the question was something about like the relationship of the debts or something. It really wasn't paying so much attention to the facts as much as what the standard is that came out. But in that case, they said these questions are all predominantly factual, so this is reviewed under the clearly erroneous standard. But Justice Gorsuch, you know, he's in the sufficiency-of-the-evidence camp, it seems. And here he is elaborating a bit on this.

> JUSTICE GORSUCH (RECORDING)
>
> Just a second.
>
> Don't we take … When we do sufficient… I mean, maybe I'm just wrong, I'm out to lunch, and I welcome being corrected. But I thought, when I used to do this a lot on the Court of Appeals, that I'd take all the facts in the light most favorable to the victor—those are the facts that I've got to use—and *then* ask the legal question: whether any reasonable juror could come to the conclusion this jury did. That's a legal question.

AMY ODOM

So here's a little in-the-room-where-it-happened background about this clip we just heard from Justice Gorsuch. Mr. Joshi was becoming very excited about this argument, and I guess because he's used to arguing before the nine "Supremist" Justices of these beautiful United States, he kept talking over the Justices, like a lot, like a *lot*.

AMY KRETKOWSKI

Oh, that was that was crazy. Just listening to it.

AMY ODOM

Yeah. So, Justice Gorsuch, when he says in the beginning of that clip, just a second, he's talking to Mr. Joshi, who kept talking over him before that. So that was a point at which everybody in the courtroom clutched their pearls a little bit. Because to have a Supreme Court Justice tell you to shut up during an argument is … something I will never experience because I will never argue the Supreme Court. But let me tell you, if I did, I think that I would probably just start crying at the podium if one of them told me to shut up.

AMY KRETKOWSKI

Oh, you would rock it. Totally, totally rock it.

I was, you know, listening to Joshi, just listening, I didn't have to see. But listening to him just cut over, cut over, cut over. I was just like, man, this guy. This balls-to-the-wall oral argument. It's like, how many times… Is he like on first-name basis with them? Because he was just… I was stunned.

AMY ODOM

Stunned.

I mean, I don't talk over any judge, anywhere. As soon as I see… If I'm at the podium, as soon as I see a judge start to open his or her mouth a little bit, I just shut up. So I can't even imagine having the confidence of someone who would just talk over Supreme Court Justice Neil Gorsuch, right? I'm also not a Supreme Court advocate, so…

You know who was very deferential and professional is Ms. Mel Bostwick, who was flawless. Absolutely, as she always is.

AMY KRETKOWSKI

She was, and they interrupted her all the time. They cut in—

AMY ODOM

Well, they're allowed to.

AMY KRETKOWSKI

I know, but it was rude. It was, you know, it was. There was a moment there where Justice Gorsuch—I know, I know he's your bud—but he was questioning her and not allowing her to answer. And just going, you know, just every time she would start to answer, he would say, You know I know you disagree, and just like cut right over her. It's like, come on, let her answer your question. But he was clearly just kind of, you know, pontificating for the other justices at that point. So anyway.

AMY ODOM

Yeah, yeah. Don't talk about my favorite conservative Justice, Justice Neil Gorsuch.

I would say Justice Jackson—after this experience—is probably my favorite. And the reason why is … two things. Number one, she had an Apple Watch and a scrunchy on her wrist like a regular person, which I just thought was incredibly charming. And also, when they all came out from behind the curtain to take their seats, they were all very stern-faced, not smiling, not really looking at anybody, just very, very serious. But Justice Jackson came out with, like, an ear-to-ear smile and just this absolutely bright, shining, toothy smile, and you could not—you could *not*—be more charmed by her, I think. Also, if you haven't seen her interview on CBS Sunday Morning Show when she was promoting her new book, I really highly recommend it. And I think you will also be totally charmed by her.

AMY KRETKOWSKI

No, I haven't seen that.

AMY ODOM

Yeah, she just seems like a wonderful, wonderful woman. And her husband, too, seems like a really great guy. And one day I hope they'll invite me over for dinner. But anyway.

AMY KRETKOWSKI

Well, one day I hope she invites me to go shoe shopping with her. That's all I want to do.

AMY ODOM

Well, here she is, not smiling anymore, getting serious, and talking about the sufficiency-of-the-evidence question.

> JUSTICE JACKSON (RECORDING)
>
> All I'm saying is, approximate balance sounds to me like sufficiency of the evidence, and “sufficiency”—“approximate”—seems like a legal question, not a factual one.
>
> So you keep saying this is factual, intensely. The only factual part is deciding what facts go in to be weighed. But whether or not they're in balance seems to me to be a question of law.

AMY ODOM

But ultimately, it really did seem like at least some of the Justices were squarely convinced that this is a purely factual question, or at least a mixed question that is predominantly factual, and therefore reviewed under the deferential clear-error standard. I would really put Justices Alito, Kagan, Kavanaugh, and maybe even Sotomayor in that camp. And I think that wherever Justice Alito goes, Thomas will follow. I really

don't know about Justice Barrett, who really didn't have any questions except for one about this party-presentation question, which was not actually the focus of the argument. And I don't know about Chief Justice Roberts, he seemed like he could really go either way. But Justices Gorsuch and Jackson seem pretty obviously in the *de novo* review camp.

Because you know, Justice Gorsuch—I know you know he's my pal, and he is, because he has made clear that he is always, always a friend to Native Americans and American veterans. And he made that clear in this case, when he put his own exclamation point on it at the end of the government's presentation. The Chief was asking everyone if they had any more questions. And here was Justice Gorsuch.

> JUSTICE GORSUCH (RECORDING)
>
> Do you think Congress adopted this language about the benefit-of-the-doubt rule, in both instances where it did, in recognition of the high esteem in which our nation holds those who've served in the Armed Services?

AMY ODOM

So there you have it. I would say, Amy, that I am pessimistically optimistic that this case will come out in a way that will be favorable to veterans. I went into this argument hoping for something really revolutionary. I came out, you know, resigned to the fact that it's probably not going to be revolutionary.

I've heard a lot of people saying that they don't even understand how this got four votes to be briefed on the merits—you know, the petition for *cert* granted—in the first place. So, I don't think anybody was, like, overly impressed with how this argument came out, in terms of

whether it's going to be something that is really a game-changer or not. But you know, I guess that that remains to be seen.

Mel Bostwick did an excellent job, this not at all a criticism of her presentation, which—again—was flawless. I just think it's a difficult question, and it's a difficult answer.

AMY KRETKOWSKI

I think they both did a great job. I was impressed by both of the advocates. I thought Mel was respectful, and I thought Mel was right and righteous about it.

And I thought that, going into the government's argument, I really thought that the Justices were going to side with the government, and then after the government's argument, I thought that he ****** them off enough that I was like, wow, I think maybe Petitioners are going to win this one and maybe win in a significant way. I think that his argument about, again, that this Congress amended a statute just to add an exclamation mark to a statute that already existed, that's just a crappy argument. And I think, you know, when the Chief came out and just said, What other laws have Congress passed that do nothing? I thought that was really telling.

I think where this gets to be difficult is that all these issues before the Veterans Court are so fact-intensive, and this one that is explicitly a weighing of the evidence, I think they could easily go with, Yes, this is a sufficiency-of-the-evidence argument. But if that's the case … and they do—like what you were saying—look at, Well, is it predominantly facts that are being…? Yeah, of course. It's going to be predominantly facts when it's a sufficiency-of-the-evidence argument. You know, what situation is going to be predominantly legal? I guess if it's one of, you know, entitlement or, you know, very basic legal questions.

So you said that you're pessimistically optimistic? Or optimistically pessimistic? You're optimistically pessimistic? Because I'll then go, I think I'm pessimistically optimistic.

AMY ODOM

I think I said I'm pessimistically optimistic.

AMY KRETKOWSKI

OK, so I'll be optimistically pessimistic just to be cussed.

AMY ODOM

My little hook of hope is in what you just said. Like, (a)(4) can't be what (b)(1) means. Like, (b)(1) has to mean something more, and that's where I get hooked in.

But then when I ask myself, are we looking at a predominantly factual question here? I just can't get away from it.

AMY KRETKOWSKI

Yeah, that's the problem.

Something else that they didn't spend a lot of time on that I think they maybe should have was the identical language in (b)(1) and (b)(2)—the mandatory "shall take due account of the rule of prejudicial error." They've got the same language there, that the Veterans Court "shall take due account of the Secretary's application and the benefit-of-the-doubt rule and shall take due account of the rule of prejudicial error."

So there's a reason why Congress put (b)(1) in there with the prejudicial error—with the mandatory "shall take due account of"—and there's a reason Congress did not add it as (a)(5) with another clear-error standard of review. I think that's really relevant. I think the placement

in the statute is relevant. The language of the statute is relevant. And just the reality that Congress writes a statute for a reason, not just to put an exclamation mark on another statute. I think that's really relevant.

A decision in Bufkin v. McDonough is expected in the summer of 2025.

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