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*COOK V. SNYDER: A VETERAN'S RIGHT TO AN ADDITIONAL HEARING FOLLOWING A REMAND AND THE DEVELOPMENT OF ADDITIONAL EVIDENCE*

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## ABSTRACT

*The Board of Veterans Appeals exists to decide questions of whether U.S. military veterans were improperly denied benefits from Department of Veterans Affairs Regional Offices around the country. The Board hears thousands of cases each year, where veterans are given the option to present new evidence and arguments in support of their claims at non-adversarial hearings before the Board Member tasked with reviewing their claim. In Cook v. Snyder, the U.S. Court of Appeals for Veterans Claims determined a veteran was not precluded from seeking a subsequent hearing before the Board at a new stage of the adjudication process. This Article analyzes the holding in Cook to find it may be interpreted broadly or narrowly in future cases and concludes that absent further guidance from the Secretary of Veterans Affairs, claimants are left with an ambiguous standard for whether they are entitled to more than one hearing during the appeals process.*

## INTRODUCTION

The Board of Veterans' Appeals ("Board"), which makes final appellate determinations within the Department of Veterans Affairs ("VA") disability benefits claims system, rendered 55,713 decisions during fiscal year 2015, the last year for which data is available.<sup>1</sup> The Board conducted hearings, where the veteran was afforded the opportunity to offer testimony in support of his or her claim directly to the member of the Board tasked with deciding it, in 12,738 of those decisions.<sup>2</sup> In 1988, when proposing the statutory right to a hearing now codified by 38 U.S.C. § 7107(b), the Senate Veterans' Affairs Committee observed there was a correlation between hearings before the Board and successful claims.<sup>3</sup>

In *Cook v. Snyder*, the United States Court of Appeals for Veterans Claims ("Court") addressed the meaning 38 U.S.C. § 7107(b). The statute reads: "The Board shall decide any appeal only after affording the appellant an opportunity for a hearing."<sup>4</sup> The question the Court addressed was

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<sup>1</sup> Bd. of Veteran's Appeals, ANNUAL REPORT: FISCAL YEAR 2015 5 (2016), [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2015AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf).

<sup>2</sup> 563 hearings took place at the Board, 4,566 took place at regional offices when members of the Board traveled there for the purposes of conducting hearings, and 7,609 took place by video conference where the veteran communicated from their local regional office with a member of the Board in Washington, D.C. *See id.* at 28.

<sup>3</sup> *Cook v. Snyder*, 28 Vet. App. 330, 336-337 (2017) (noting that in fiscal year 1987, 19.5% of claims heard by a Board member in Washington, D.C. were granted and 30.6% of claims heard by Board members at travel hearings were granted, compared to an overall grant rate of 12.8%).

<sup>4</sup> 38 U.S.C. § 7107(b) (2017).

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whether the phrase “an opportunity for a hearing” was properly read in the singular, *i.e.* whether entitlement to one hearing is all the VA must provide before rendering a decision on a veteran’s claim for disability benefits, or if that veteran is entitled to additional hearings upon request during different stages of the proceedings.

Each claim for VA disability benefits begins with the veteran filing a claim with their local VA Regional Office (“RO”). When the RO makes a decision, they will also notify the claimant of the right to initiate the appeals process.<sup>5</sup> In order to begin the appeal, the veteran must submit a “notice of disagreement” within one year of an unfavorable decision.<sup>6</sup> If the RO continues to deny the claim, the veteran can appeal the denial to the Board.<sup>7</sup> When appealing to the Board, the veteran may indicate whether he or she wishes to be afforded a hearing before the Board renders a decision on their claim.<sup>8</sup>

The hearings are intended to be informal and non-adversarial, and are intended to give the veteran an opportunity to provide any information they feel is relevant and material to their claim. The Board member conducting the hearing has the duty to “explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant’s position.”<sup>9</sup> A transcript of the hearing will be produced and added to the veteran’s claims file for consideration before the Board renders a decision.<sup>10</sup> If the Board renders a negative decision and the veteran remains unsatisfied, he or she may then file an appeal with the Court, which has exclusive jurisdiction over appeals of Board decisions and has the power to reverse, remand or affirm the Board’s decision.<sup>11</sup>

In *Cook*, the Court addressed the interpretation of the phrase “an opportunity for a hearing,” specific to a situation where the veteran sought an additional hearing following an earlier remand of his claim from the Court. The Court addressed whether this phrase meant that the veteran was precluded from a second hearing at a separate stage of his appeal, after initially being provided one as part of his initial appeal to the Board. The Court’s holding, that Mr. Cook was not precluded from a second hearing, applies much more broadly to a veteran’s right to present sworn testimony in the

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<sup>5</sup> 38 C.F.R. 38 § 19.25 (2017).

<sup>6</sup> 38 U.S.C. § 7105(b)(1) (2017).

<sup>7</sup> 38 C.F.R. § 19.25 (2017).

<sup>8</sup> 38 C.F.R. § 20.700(e) (2016).

<sup>9</sup> 38 C.F.R. § 3.103(c)(2) (2016).

<sup>10</sup> 38 C.F.R. § 20.714 (2016).

<sup>11</sup> 38 U.S.C. §§ 7251-52, 7266 (2016).

process of VA adjudication of his or her claim, but still leaves certain questions unanswered. It also offers important guidance on the question of what deference is owed to the Secretary of Veterans Affairs in his interpretation and application of VA's regulations.

### I. BACKGROUND OF MR. COOK'S CASE

Edward Cook ("the Veteran") served in the United States Navy in 1972 and 1973.<sup>12</sup> His service medical records indicated that he experienced low back pain while in service and at one point was diagnosed with a mild muscle pull.<sup>13</sup> Mr. Cook filed a claim for service connection at his local RO in May 2000, asserting that his current back disability was caused by or related to the back injury suffered during his time in service.<sup>14</sup> His claim was denied, and in 2006 he sought to reopen it. In 2007, the RO denied his request because it determined the evidence submitted was not new and material and therefore did not justify reopening the previously denied claim.<sup>15</sup>

Mr. Cook appealed the denial to the Board.<sup>16</sup> Separately, Mr. Cook filed a new claim with the RO seeking entitlement to total disability based on individual unemployability ("TDIU"), which was also denied by the RO and which he also appealed to the Board.<sup>17</sup>

In June 2012, Mr. Cook testified at a Board hearing. Following his testimony about his back problems and their effects on employment, the Board found that new and material evidence had been submitted, which warranted reopening his claim, and remanded the claim to the RO for further evidentiary development.<sup>18</sup> After the RO received additional evidence and Mr. Cook underwent a VA examination, it continued to deny his claim

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<sup>12</sup> Cook v. Snyder, 28 Vet. App. 330, 333 (2017)

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see also 38 U.S.C. § 1110 (2016).

<sup>15</sup> Cook, 28 Vet. App. at 333; see also 38 C.F.R. § 3.156 (2016) ("A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decision makers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim.")

<sup>16</sup> Cook, 28 Vet. App. at 333.

<sup>17</sup> *Id.*; see also 38 C.F.R. § 4.16(a) (2016) ("Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities").

<sup>18</sup> Cook, 28 Vet. App. at 333.

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for service connection and entitlement to TDIU.<sup>19</sup> Mr. Cook then requested a new Board hearing to provide further testimony.<sup>20</sup>

The Board issued a new decision in February 2014 that continued to deny the Veteran's claims.<sup>21</sup> It acknowledged Mr. Cook's request for a hearing, but denied it, stating that because he had already been afforded a Board hearing, no further hearing was necessary.<sup>22</sup> Mr. Cook appealed this denial to the Court.<sup>23</sup> In October 2014, the Court granted a joint motion for remand filed by the parties and sent the appeal back to the Board on the grounds that it failed to address favorable evidence in its previous decision.<sup>24</sup> Following this, Mr. Cook again requested a Board hearing to present additional testimony in support of his claim.<sup>25</sup>

Mr. Cook was not afforded an additional hearing, and the Board rendered a new decision denying his claim in February 2015.<sup>26</sup> In its decision, the Board specifically noted that because the Veteran had previously been afforded a hearing before the Board in June 2012, no further hearing was necessary.<sup>27</sup> The Veteran again appealed this denial, which led to the Court's precedential decision.<sup>28</sup>

## II. DISCUSSION OF THE COURT'S HOLDING

The parties set forth two very differing arguments on the narrow question of whether the Board properly determined that Mr. Cook was not entitled to an additional hearing. Mr. Cook argued that the indefinite article "a" in § 20.700(a) did not limit a claimant to one hearing, regardless of the number of times the claim was before the Board.<sup>29</sup> The Secretary of Veterans Affairs, on the other hand, argued that "a" usually connotes the singular; that his interpretation of the regulatory language is entitled to deference

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<sup>19</sup> *Id.*; see also 38 U.S.C. § 7105(d)(1).

<sup>20</sup> Cook, 28 Vet. App. at 334.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Cook, 28 Vet. App. at 334.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; see generally *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990) (demonstrating that the majority of the decisions the Court issues are Single Judge Decisions binding only on the parties that may not be cited as precedent.).

<sup>29</sup> Cook, 28 Vet. App. at 335; 38 C.F.R. § 20.700(a)(2016) ("A hearing on appeal will be granted if an appellant, or an appellant's representative acting on his or her behalf, expresses a desire to appear in person.").

to the extent the language could be considered ambiguous; and that Mr. Cook's interpretation of the regulation would lead to "absurd results."<sup>30</sup>

As with any question of statutory interpretation, the Court applied the test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>31</sup> It determined that "both parties advanced grammatically plausible readings of the sentence, 'the Board shall decide any appeal only after affording the appellant an opportunity for a hearing,'" and reached the conclusion that "the statute's language is simply not clear on this point."<sup>32</sup> Thus, it determined that 38 U.S.C. § 7107(b) was ambiguous with respect to the question of whether a veteran may be afforded more than one hearing.<sup>33</sup> Further, it found that the regulation identified by the Secretary which implemented the statutory provision, 38 C.F.R. § 20.700(a), did not speak to the ambiguity at issue because it contained the same basic ambiguous language as the statute.<sup>34</sup> As such, the Court declined to apply *Chevron* deference to the Secretary's interpretation of the regulation.<sup>35</sup> Concluding that *Chevron* deference was inapplicable, the Court then turned to the test set forth in *Skidmore v. Swift & Co.*, and concluded that the Secretary's interpretation of the language at issue lacked the power to persuade.<sup>36</sup>

After establishing that *Skidmore*, rather than *Chevron* applied, the Court sought to ascertain the meaning of the statute by reading the statute as a whole. Upon determining that doing so did not eliminate the ambiguity, the Court looked to the statute's context with a view to its place in the statutory scheme.<sup>37</sup> The Court noted that a crux of the Veterans Judicial Review Act ("VJRA"), which established judicial review of VA's administrative decisions, was that the Court could set aside Board decisions and remand appeals, more than once if necessary.<sup>38</sup> The Court noted, "the focus of a claim

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<sup>30</sup> Cook, 28 Vet. App. at 335.

<sup>31</sup> Cook, 28 Vet. App. at 338; see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

<sup>32</sup> Cook, 28 Vet. App. at 338.

<sup>33</sup> *Id.* at 339.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 339-340; see also *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.")

<sup>37</sup> Cook, 28 Vet. App. at 338.

<sup>38</sup> Pub.L. 100-687, (The Veteran's Judicial Review Act of 1988 established the United States Court of Appeals for Veterans Claims); *Id.* at 339, (The passage of the act "ended the "splendid isolation" in

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may change or evolve between an initial Board hearing on the claim and Board consideration of that claim following remand from the Court,” a principle which proved key to its ultimate holding.<sup>39</sup> The Court determined that reading the statute as barring a claimant who had previously testified from receiving a subsequent hearing during further appellate proceedings would be “neither solicitous of a claimant nor productive of informed Board decision making.”<sup>40</sup>

Against this backdrop, the Court turned to the facts of Mr. Cook’s appeal. Specifically, when Mr. Cook testified before the Board in June 2012, the Court noted that the issue was whether new and material evidence had been submitted to reopen the previously denied claim for service connection for a lumbar spine disability.<sup>41</sup> After the Board agreed to reopen the claim, but denied it again, the issue on appeal had shifted.<sup>42</sup> By the time the Veteran requested a subsequent Board hearing in November 2014, the issue was no longer whether he had provided new and material evidence sufficient to reopen the previously denied claim.<sup>43</sup> Rather, the issue was now whether or not the evidence of record demonstrated that the Veteran’s current back problems were linked to his service.<sup>44</sup> At the time Mr. Cook requested his second hearing, he asserted that he had relevant evidence in support of that issue.<sup>45</sup> As the Court noted, to read the statute as prohibiting him from testifying at a Board hearing where the issue had changed “from one issue with distinct legal criteria to another” would be inconsistent with the principles underlying the pro-claimant veterans’ disability appeals process.<sup>46</sup>

In concluding that the Board erred by finding Mr. Cook was not entitled to an additional hearing, the Court was careful to include language in its holding stating that it was not adopting the argument that he is entitled to a Board hearing “at any time on any issue for any reason.”<sup>47</sup> Instead, it confined its holding to stating simply that a claimant who received a hearing at one stage of appellate proceedings is not barred from requesting and receiv-

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which VA’s administrative decisions, unlike those of other Federal agencies, were “insulated from judicial review.”).

<sup>39</sup> Cook, 28 Vet. App. at 342.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 343.

<sup>43</sup> *Id.* at 342-343.

<sup>44</sup> Cook, 28 Vet. App. at 342-343.

<sup>45</sup> *Id.* at 343.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 345.



ing a Board hearing during a separate stage.<sup>48</sup> It further indicated that it was sensitive to the “administrative burden facing the Board in the provision of personal hearings on matters appealed to it.”<sup>49</sup> However, despite such concerns, the Court determined that deferring to the Secretary’s interpretation of the statute would be ignoring the intent of Congress discerned from the language of the statute, “the text and context of related statutory and regulatory provisions, and the overall structure of the VJRA, and the solicitous and pro-claimant principles informing veterans’ benefits law.”<sup>50</sup> It further noted that the Secretary was free to follow public notice and comment guidelines and promulgate a regulation that resolves the ambiguity in the statute.<sup>51</sup>

### III. ANALYSIS

The Court’s holding in *Cook* is significant in both the clarity it provides to the question of a how expansive a veteran’s right to a hearing during the VA claim’s process is, its use of language clarifying that the right does not extend to entitlement to a hearing “at any time on any issue for any reason,” and for the questions it leaves unanswered. It is also notable for its detailed demonstration of the process of interpreting an ambiguous VA regulation and how such process is unique to the veterans’ disability benefits statutory and regulatory scheme.

As the Court of Appeals for Veterans Claims exists exclusively to provide judicial oversight of VA actions, the Court must always apply the framework set forth in *Chevron* in interpreting the meaning of any statute.<sup>52</sup> If the Court determines that Congress has not directly addressed the precise question at issue, it then turns to the agency’s implementing regulation and must determine whether such regulation is based on a permissible construction of the statute. If so, the Court must apply the framework set forth in *Chevron* in reviewing an agency’s interpretation of a statute which it administers.<sup>53</sup> As the implementing regulation in this case contained the same ambiguous language as the statute, the Court determined that *Chevron* deference was not appropriate.<sup>54</sup> Turning to the guidelines espoused in *Skid-*

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<sup>48</sup> *Id.*

<sup>49</sup> *Cook*, 28 Vet. App. at 340.

<sup>50</sup> *Id.* at 345.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 345-346.

<sup>53</sup> *Chevron*, 467 U.S. at 842-843.

<sup>54</sup> *See id.*

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*more*, the Court then addressed whether the Secretary's interpretation of the statute contained the "power to persuade," and concluded that it did not.<sup>55</sup>

From there, the Court sought guidance in the statute's context "with a view to its place in the statutory scheme."<sup>56</sup> In doing so, the Court turned its focus to interpretative guidance that is unique to veterans' benefits jurisprudence and which ultimately guided its decision in *Cook*. The Court noted the Supreme Court's observation that the VA adjudicatory process is designed to function "with a high degree of informality and solicitude for the claimant."<sup>57</sup> Furthermore, as the Court described, the VA adjudicatory process is a non-adversarial system that is predicated upon a structure that provides for notice and an opportunity to be heard throughout every step of the process.<sup>58</sup> Even if the Secretary's interpretation of a statute is "plausible," the Court will adopt the Secretary's interpretation that is less favorable to the veteran only if the statutory language unambiguously requires it to do so.<sup>59</sup>

The Court held in *Trafter v. Shinseki*, noting the specificity to the veterans' benefits scheme:

[I]f VA's interpretation of the statutes is reasonable, the courts are precluded from substituting their judgment for that of VA, unless the Secretary has exceeded his authority; the Secretary's action was clearly wrong; or the Secretary's interpretation is unfavorable to veterans, such that it conflicts with the beneficence underpinning VA's veterans benefits scheme, and a more liberal construction is available that affords a harmonious interplay between provisions.<sup>60</sup>

Put simply, the Court has the ability to "substitute" its judgment for the Secretary's only in instances where the Secretary's interpretation conflicts with the intended beneficence of the veterans' benefits scheme.

The Court drew on this ability in *Cook* to conclude that a veteran who received a hearing at one stage of the proceedings is not barred from receiving another hearing during a separate stage. The "high degree of informality and solicitude for the claimant," along with the predication of the VA adjudicatory process on the opportunity to be heard throughout the progression

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<sup>55</sup> *Cook v. Snyder*, 28 Vet. App. 330, 338-339 (2017).

<sup>56</sup> *Id.* at 340.

<sup>57</sup> *Id.* at 341 (citing *Henderson v. Shinseki*, 562 U.S.428, 431 (2011)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (citing *Sursely v. Peake*, 551 F.3d 1351, 1357 (Fed. Cir. 2009)).

<sup>60</sup> *Trafter v. Shinseki*, 26 Vet. App. 267, 272 (2013). (referencing *Brown v. Gardner*, 513 U.S. 115, 122 (1994), which also noted that the length of endurance of certain regulations has no bearing on whether it is consistent with a statute, which is particularly true in veterans' law given that Congress took so long to provide for judicial review of VA actions).

of the claim, prompted the Court to determine that reading the statute as a bar to a subsequent Board hearings at a later stage of the proceedings would be inconsistent with the stated purpose of a Board hearing in the context of the judicial review process of VA decision making.<sup>61</sup> Furthermore, the Federal Circuit's guidance, that even a plausible interpretation from the Secretary that is less favorable to the veteran only warrants deference when the language unambiguously requires that interpretation, freed the Court from being bound by the Secretary's interpretation in the present case, even if such interpretation was plausible.<sup>62</sup>

Although the Court declined to defer to the Secretary's interpretation of the statute and remanded Mr. Cook's case to the Board so he could be afforded the additional hearing that he sought, the Court was careful to explain the limits of its holding.<sup>63</sup> It clarified that the language of the statute did not entitle the veteran to "a Board hearing at any time on any issue for any reason."<sup>64</sup> Instead, it limited its holding to a situation such as Mr. Cook's, where the veteran was seeking a second hearing at a separate stage of the appellate proceedings before the Board, namely after the appeal had already been sent back to the Board by way of a remand order from the Court.<sup>65</sup>

The Court expressed the limits of its holding in the statement that the claimant is "not barred" from requesting and receiving a second Board hearing at a separate stage of the proceedings, but did not go as far as to state that a claimant is "entitled" to an additional hearing simply because a claim is back in front of the Board following an additional step in the proceedings.<sup>66</sup> Clearly, the onus remains on the veteran and his or her representative to evaluate the status of the evidentiary development in their claim and make the determination of whether seeking an additional hearing before the Board will be worthwhile. The Court acknowledged this near the end of its decision, and recognized that claimants may opt to forgo opportunities for Board hearings in the interest of obtaining quicker decisions from the Board.<sup>67</sup>

It is clear from the Court's holding that veterans have the right to seek an additional hearing in a situation such as Mr. Cook's, where the claim is

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<sup>61</sup> Henderson *ex. rel.* v. Shinseki, 562, U.S. 428, 431 (2011).

<sup>62</sup> Cook v. Snyder, 28 Vet. App. 330, 345 (2017).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 346.

<sup>66</sup> *Id.* at 345.

<sup>67</sup> *Id.*

back before the Board following an earlier remand from the Court. However, it is not entirely clear whether that is a blanket right that applies to other situations where a claim is back before the Board after a separate stage in the appellate process. For example, a veteran may appeal a regional office denial to the Board and request a Board hearing.<sup>68</sup> The testimony put forth during that hearing may prompt the Board to send the veteran's claim back to the RO for additional evidentiary development, such as locating missing treatment records or obtaining a needed VA examination.<sup>69</sup> Although the veteran may choose to waive regional office consideration and send the case directly back to the Board for a new decision, he or she may also opt to have the RO consider the additional evidence and render a new decision based thereon.<sup>70</sup> If the RO does so, and continues to render an unfavorable decision, could the veteran then request an additional hearing before the Board renders a new decision on his or her claim?

In such an instance, the issue the Board would be considering, such as, for example, service connection for a back disability, would likely be unchanged from the previous hearing. The Board would be considering new evidence, but the issue itself would remain the same. The Court pointed out in *Cook* that the issue on appeal had shifted from the time of Mr. Cook's first hearing to the time that he requested his second.<sup>71</sup> While the Court stated that reading the statute as prohibiting the claimant from testifying at a Board hearing "where the issue on appeal had shifted" was counter to the stated purpose of a hearing and inconsistent with the pro-claimant VA appeals system,<sup>72</sup> it is unclear if the Court's interpretation would apply to an instance where the issue on appeal had not "shifted." From the Court's later statement, that a veteran is "not barred" from requesting and receiving a hearing at a separate stage of the appeal, it appears this right would likely remain following a remand from the Court, even if the issue on appeal remained the same. It is not certain, however, that the right would apply to the hypothetical situation described above, where a veteran's claim is back in front of the Board following additional development at the RO level.

Answering this question would require the Court to explain how it defines a "stage" of the appeal, and how broadly or narrowly it would define what constitutes a "separate issue." Taking the hypothetical situation of the veteran whose claim for service connection for a back disability is re-

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<sup>68</sup> See 38 C.F.R. § 20.200 (1992); 38 C.F.R. § 20.700 (1992).

<sup>69</sup> See 38 C.F.R. § 20.1506 (2008); 38 C.F.R. § 19.9 (1992).

<sup>70</sup> 38 C.F.R. § 20.1508 (2008).

<sup>71</sup> *Cook v. Snyder*, 28 Vet. App. 330, 342-343 (2017).

<sup>72</sup> *Id.* at 343.

manded from the Board to the RO then winds up back before the Board, would this be considered a separate “stage” of the appeal, or is it a continuation of the earlier stage? Furthermore, if the veteran sought a separate hearing so that he could offer testimony on the inability to locate certain evidence, or to challenge the adequacy or factual conclusions of a VA examination, could that be considered a “separate issue,” if his or her first Board hearing focused entirely on a description of the in-service injury and current symptoms? Or would requesting a hearing on such issues be akin to seeking a hearing “at any time on any issue for any reason,” which the Court expressly rejected in *Cook*?<sup>73</sup> Does the Board maintain any discretion in making such a determination?

It is likely that such questions cannot be answered solely from the Court’s interpretation of section 7107(b) and its holding in *Cook*. What is clear from *Cook* is that when a veteran who has previously testified before the Board seeks a new hearing at a subsequent stage of the appeal, particularly following a remand order from the Court, he is not barred from receiving a new hearing by the statute’s use of the phrase “an opportunity for a hearing.”<sup>74</sup> Whether or not the Board must unequivocally grant such a request, or whether such a request made at a different stage of the appeals process must be afforded the same consideration, likely remains uncertain. Following *Cook*, it appears that at the very least the Board must provide legally sound reasons and bases if it denies a request for a subsequent Board hearing, regardless of when that request is made.<sup>75</sup> If the Board denies such a request, but articulates that it is doing so because the “stage” of the appeal has not changed and/or the issue on appeal remains the same, *Cook* does not go so far as to hold that the Board’s decision will automatically be remanded for that reason alone if and when it is appealed to the Court.

As the Court suggested, the Secretary of Veterans Affairs may wish to promulgate a new regulation resolving the ambiguity in the statute and providing clarity on the issue.<sup>76</sup> However, it is clear from the Court’s reasoning in *Cook* that veterans and their representatives will want to take a close look at whether an additional hearing may be worthwhile or necessary in putting forth the strongest case possible, particularly following a previous remand order from the Court, even if the issue on appeal remains unchanged. This must be weighed against the additional time it may take for

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<sup>73</sup> *Id.* at 345.

<sup>74</sup> *Id.* at 341.

<sup>75</sup> See 38 U.S.C. § 7104(d) (“Each decision of the Board shall include—a written statement of the Board’s findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record[.]”).

<sup>76</sup> *Cook*, 28 Vet. App. at 345-346.

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the veteran to receive a final decision on his or her claim. It is clear that the Board can no longer ignore or deny such a request simply on the basis that the veteran was previously afforded a hearing, as the Board decision on appeal in *Cook* did.<sup>77</sup> Whether the Board maintains the discretion to deny such a request, if it articulates adequate reasons or bases for its decision to do so, likely must still be addressed on a case by case basis. This is likely to remain the case unless and until the Secretary promulgates a new regulation aimed at resolving the remaining ambiguity.

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<sup>77</sup> *See id.* at 334. (quoting the Board decision: “The [v]eteran was afforded a Board hearing in June 2012. He also presented testimony before the RO in September 2007. The transcripts have been associated with the record. As the [v]eteran has been afforded a Board hearing, no further hearing is necessary.”).

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