**72 FLRA No. 47**

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5572
(71 FLRA 1141 (2020))

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ORDER GRANTING
MOTION FOR RECONSIDERATION

May 3, 2021

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and James T. Abbott, Members
(Chairman DuBester concurring;
Member Kiko concurring)

Decision by Member Abbott for the Authority

## I. Statement of the Case

This case is before the Authority on the Union's motion for reconsideration (motion) of the Authority's decision in *U.S. Department of VA, John J. Pershing VA Medical Center* (*VA*).[1] Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.[2] For the reasons that follow, we grant the Union's motion and, consequently, consider the merits of the Agency's additional exceptions that were not considered in *VA*. Upon consideration of those claims, we deny, in part, and dismiss, in part, the Agency's exceptions.

## II. Background and Authority's Decision in *VA*[3]

The grievants – Title 38 health care professionals under the U.S. Code – work a regular forty-hour work week in addition to performing rounding duties two weekend days per month. Rounding duties involve visiting and assessing patients and can take one to six hours. In 2014, the Agency issued Veterans Affairs (VA) Handbook 5011/27 and changed its policy to define the basic workweek for full-time physicians to be forty hours, from Sunday through Saturday, in order to cover extended service hours during the evenings and weekends. In 2017, the Union filed a grievance alleging that the Agency was violating the parties' collective-bargaining agreement (CBA) and VA Handbook 5011/27 by scheduling physicians to work on weekends in excess of forty hours per week. As a remedy, the Union requested that the Agency stop scheduling physicians for more than forty hours per week and provide retroactive "rest and relaxation" under Article 35 of the parties' CBA for those periods of time when the grievants had worked more than forty hours during a given week.[4]

The Arbitrator framed the issue as "[d]id the Agency violate the CBA and any associated guidance and/or directives in scheduling Title 38 physicians to perform patient rounding on Saturdays and/or Sundays during weeks they were also scheduled for their regular [forty]-hour tours of duty? If so, what is the appropriate remedy?"[5] At arbitration, the Agency argued that the grievance was not arbitrable because it concerned compensation and direct patient care, and was thus excluded from the grievance procedure by 38 U.S.C.

[1] 71 FLRA 1141 (2020) (then-Member DuBester dissenting).
[2] 5 C.F.R. § 2429.17.
[3] The facts of this case are set forth in greater detail in *VA*. 71 FLRA at 1141-42.
[4] *Id.* Under Article 35, Section 20 of the CBA, the Agency is "authorized to approve absence for a period not to exceed [twenty-four] consecutive hours for rest and relaxation for full-time physicians . . . who have been required to serve long hours in the care and treatment of patients." Award at 12-13.
[5] *Id.* at 5. The issue statement that the parties jointly agreed to at the hearing was as follows:

> Did John J. Pershing VA Medical Center (the Agency) unilaterally interpret the provisions of the [CBA] and VA as well as the [Veterans Health Administration] [h]andbooks and [d]irectives and applicable [f]ederal [l]aws? In doing so, did the Agency implement an unwritten practice and/or policy related to "provider roundings" which directly impacted bargaining unit physicians without first providing proper notice to the exclusive representative, the American Federation of Government Employees (AFGE) Local 2338 (the Union) which violated the [CBA]? If so, what shall the remedy be?

Exceptions, Attach. 4, Joint Ex. 15, Agreed Upon Issue Statement; Award at 3.

§ 7422.[6] As relevant here, § 7422 excludes from the negotiated grievance procedure any "matter or question" concerning either "professional conduct or competence," including patient care, or "employee compensation."[7] Although the Arbitrator agreed that rounding duties involved "physician-patient care," he did not address whether the grievance was excluded because of this.[8] He concluded that rest and relaxation did not involve pay or compensation and that the grievance was not barred by § 7422.[9] The Arbitrator sustained the Union's grievance. As relevant here, he ordered the Agency to: (1) "include weekend rounding assignments in the basic [forty]-hour workweek by scheduling a two-hour workday for each shift of weekend rounding" and to adjust one of the other workdays to be six hours, and (2) to provide the grievants retroactive rest and relaxation time.[10] The Agency filed exceptions to the award on several grounds, including that the award was contrary to 38 U.S.C. § 7422 because the grievance concerned professional conduct or competence.

The Authority concluded that the grievance was contrary to 38 U.S.C. § 7422 and not substantively arbitrable.[11] Because scheduling weekend rounding involves direct patient care, the Authority found the Arbitrator's factual finding that weekend rounding involves "physician-patient care" work supported the "conclusion that this case clearly concerns a matter of professional conduct or competence within the meaning of § 7422(b)."[12] The Authority thus held that the grievance was excluded from the negotiated grievance procedure pursuant to 38 U.S.C. § 7422(b) and set aside the award. The Union filed its motion for reconsideration on December 3, 2020.

## III. Motion for Reconsideration

The Union asks the Authority to reconsider its decision in *VA*.[13] The Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[14] As relevant here, the Authority has held that errors in its legal conclusions may justify granting reconsideration.[15]

In its motion for reconsideration, the Union argues that the Authority "exceeded its statutory authority when it determined that the arbitration award in this matter concerned professional conduct or competence under [§] 7422 without such a determination by the VA Secretary."[16] Specifically, the Union points out that the Agency did not seek a § 7422 determination from the VA Secretary in this case[17] and argues that 38 U.S.C. § 7422(d) "explicitly provides that determinations regarding whether a matter is excluded from collective bargaining may only be made by the VA Secretary."[18] The Union argues that courts have "recognized that [the] statutory language [under § 7422(d)] means that the [Authority] may not rule on whether a matter is excluded from collective bargaining pursuant to [§] 7422" and thus that the Authority exceeded its jurisdiction in this case.[19]

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[6] *VA*, 71 FLRA at 1142. Section 7421(a) of Title 38 authorizes the VA Secretary to prescribe regulations governing the hours, conditions of employment, and leaves of absences of employees appointed under Title 38, including physicians. 38 U.S.C. § 7421. The authority to prescribe regulations under § 7421 "is subject to the right of [f]ederal employees to engage in collective bargaining" under the Statute, but with certain enumerated exemptions. *Id.* § 7422(a). Under § 7422(b):

> Such collective bargaining (and any grievance procedures provided under a collective[-]bargaining agreement) in the case of employees described in [§]7421(b) . . . may not cover, or have any applicability to, any matter or question concerning or arising out of (1) *professional conduct or competence*, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.

*Id.* § 7422(b) (emphasis added). "Professional conduct or competence" means "direct patient care." *Id.* § 7422(c)(1).

[7] 38 U.S.C. § 7422.

[8] *VA*, 71 FLRA at 1142.

[9] *Id.*

[10] Award at 23-25; *VA*, 71 FLRA at 1142.

[11] *VA*, 71 FLRA at 1142-43.

[12] *Id.* (noting that "the Secretary of the VA has repeatedly found that the Agency's ability to control the work schedules of Title 38 professionals is a matter involving professional conduct or competence because it implicates the Agency's ability to provide direct patient care" and citing several such § 7422 determinations).

[13] 5 C.F.R. § 2429.17 ("After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order.").

[14] *AFGE, Nat'l VA Council #53*, 71 FLRA 741, 742 (2020) (*Council #53*) (then-Member DuBester concurring); *AFGE, Loc. 2338*, 71 FLRA 644, 644 (2020).

[15] *Council #53*, 71 FLRA at 742 (citing *Indep. Union of Pension Emps. for Democracy & Just.*, 71 FLRA 60, 61 (2019) (then-Member DuBester concurring)).

[16] Mot. for Recons. (Mot.) at 6 (internal quotation omitted).

[17] *Id.* at 2.

[18] *Id.* at 3.

[19] *Id.* at 4. The Union cites a number of cases, including *AFGE, Loc. 2152 v. Principi*, 464 F.3d 1049, 1059 (9th Cir. 2006) (*Principi*), where the court stated that "Congress has entrusted the VA Secretary with the sole authority to determine whether a section 7422(b) exemption applies to a grievance." *Id.* The Union also cites *AFGE, Loc. 2145*, 61 FLRA 571 (2006) (*AFGE*), and notes that the Authority declined "to accept an arbitrator's conclusion that a matter was precluded by section 7422 where there was no evidence that the VA Secretary had issued a determination relating to the case." *Id.* at 5. In another case where the Authority found a grievance excluded pursuant to § 7422(b), the Authority noted that *AFGE* would no longer be followed. *U.S. Dep't of VA, John J Pershing VA Med. Ctr.*, 71 FLRA 769(a), 769(c) n.12 (2020) (*VA II*) (then-Member DuBester dissenting).

As the Union states, 38 U.S.C. § 7422(b) "sets forth three substantive limitations on . . . Title 38 employees' bargaining rights."[20] Under § 7422(b):

> Such collective bargaining (and any grievance procedures provided under a collective[-]bargaining agreement) in the case of employees described in [§] 7421(b) . . . may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.[21]

However, as the Union stresses, § 7422(d) provides that the issue of whether a matter or question concerns or arises out of one of these enumerated exemptions "*shall be decided by the Secretary* and is not itself subject to collective bargaining and may not be reviewed by any other agency."[22] The Authority has repeatedly declined to assert jurisdiction in cases where the VA Secretary has explicitly made a determination under § 7422(d), which the Authority has acknowledged removes the case from the scope of collective bargaining under the Statute and may not be reviewed by the Authority.[23] In cases where the VA Secretary has *not* made a § 7422(d) determination, the extent to which our jurisdiction is limited is less clear. However, the Union's arguments on this point convince us that we erred when we determined that the grievance in this case concerned a matter under § 7422(b) and was thus excluded from the negotiated grievance procedure.

Section 7422(d) states that whether a matter is excluded from the negotiated grievance procedure "shall be decided by the Secretary."[24] Upon reconsideration, we find instructive the U.S. Court of Appeals for the Ninth Circuit's determination that "Congress has entrusted the VA Secretary with the sole authority to determine whether a § 7422(b) exemption applies to a grievance."[25] Moreover, we are convinced by the Union's argument that the Authority's decision interrupts the statutory scheme under 38 U.S.C. § 7422 and decides an issue beyond the Authority's statutory mandate.[26]

Thus, based on the language of § 7422(d) and the above discussion, we find that the Authority erred in its legal conclusion in *VA* when it held that the grievance concerned a matter of professional conduct or competence within the meaning of § 7422(b)—thus excluding it from the grievance procedure—without such a determination from the VA Secretary to that effect.[27] The Authority should have determined that the award was not contrary to 38 U.S.C. § 7422 and specified that the grievance was procedurally arbitrable because there was no 7422-determination holding otherwise. As a result, we find that there are extraordinary circumstances warranting reconsideration of *VA*. We grant the Union's motion for reconsideration and consider the merits of the exceptions that were not considered in *VA*.[28]

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[20] Mot. at 3.

[21] 38 U.S.C. § 7422(b). The employees listed in § 7421(b) include: physicians, dentists, podiatrists, optometrists, registered nurses, physician assistants, expanded-duty dental auxiliaries, and chiropractors. *Id.* § 7421(b).

[22] *Id.* § 7422(d) (emphasis added).

[23] *See, e.g.*, *NFFE, VA Council of Consol. Locs.*, 71 FLRA 1193, 1194 (2020) (then-Member DuBester concurring) (finding that the Authority lacked jurisdiction to review the union's petition for review because the VA Secretary had made a determination on the matter under § 7422(d)); *U.S. Dep't of VA, Md. Health Care Sys., Balt., Md.*, 59 FLRA 384, 385-86 (2003) (finding that the Under Secretary of VA made a determination under § 7422 that the reassignment of the nurses was a matter concerning or arising out of professional conduct or competence, and, as such, the matter was not grievable under the negotiated grievance procedure).

[24] 38 U.S.C. § 7422(d). Although in *VA* we cited to numerous Title 38 Decision Papers and concluded that "the Secretary of the VA has repeatedly found that the Agency's ability to control the work schedules of Title 38 professionals is a matter involving professional conduct or competence because it implicates the Agency's ability to provide direct patient care," we now recognize that the Secretary had not made that determination *in this specific case* or in an earlier determination that applied to this specific case. *VA*, 71 FLRA at 1142-43. We recognize these matters are fact-specific and also subject to change.

[25] *Principi*, 464 F.3d at 1059; s*ee also* Mot. at 4.

[26] Mot. at 4. In support of this, we recognize that the Agency contrarily argued in its exceptions that "[t]he [A]rbitrator exceeded his authority by disregarding limitations on his authority under 38 U.S.C. § 7422" because the "[A]rbitrator's analysis made a determination as to whether a matter concerned compensation within the meaning of 38 U.S.C. § 7422(b)(3), the authority of which is limited to the Secretary of the Department of [VA]." Exceptions at 6-7. Furthermore, we recognize upon re-reviewing the record in this case, that Article 43, Section 2(C) of the parties' CBA restates the exemptions under 38 U.S.C. §7422(b) and includes the following note:

> The language in the above paragraph shall only serve to preclude a grievance where the Secretary, or a lawfully appointed designee of the Secretary (currently the Under-Secretary for Health), determines in accordance with 38 [U.S.C. §] 7422 that the grievance concerns or arises out of one or more of the three items listed above.

Opp'n, Attach. 2, Collective-Bargaining Agreement (CBA) at 228-29. Although this has no bearing on the statutory language, we do find it informative on reconsideration.

[27] The Agency did not pursue a 7422-determination in this case. Award at 21.

[28] *See, e.g.*, *U.S. DOL*, 60 FLRA 737, 738 (2005) (Chairman Cabaniss concurring) (where the Authority found that it had erred in a factual finding and thus granted the agency's

In order to provide more clarity to parties moving forward, we note that based on the above discussion and the language of § 7422(d), neither the Authority, nor arbitrators, have the authority to determine that a matter is excluded from the grievance procedure under § 7422(b). If the VA Secretary or his/her designee issues a 7422-determination finding a matter or question concerns or arises out of one of the limitations set forth in § 7422(b), then, consistent with established Authority precedent, it is clear that we are without jurisdiction over the issue.[29] However, if the Secretary has not issued a 7422-determination finding a matter or question concerns or arises out of one of the limitations set forth in § 7422(b), then the Authority is not similarly precluded of jurisdiction and may decide the issue.[30]

## IV. Exceptions Not Considered in *VA*[31]

### A. The Agency failed to establish that the Arbitrator exceeded his authority.

The Agency briefly argues in two similar exceptions that the Arbitrator exceeded his authority "when he changed the agreed-upon issue to be decided."[32] In its first exception, the Agency simply restates, without explanation, the issue statement that the parties jointly proposed at the beginning of the hearing and the issue statement as re-framed by the Arbitrator after hearing the evidence in the case.[33] In its second exception, the Agency asserts, without elaboration, that the Arbitrator "expanded the scope of the issues to be heard" by re-framing the issue statement.[34] Because the Agency fails to explain how the Arbitrator's re-framed issue statement resulted in him failing to resolve an issue submitted to arbitration or resolving an issue not submitted to arbitration, we deny these exceptions as unsupported.[35]

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motion for reconsideration and considered the merits of the claims that were not considered in the underlying decision).

[29] *See supra* note 23.

[30] We state as much based on the language of § 7422(d), and that only the VA Secretary may decide if a matter falls under § 7422(b) and is excluded from the grievance procedure, even though, as in this case, it seems obvious to us that the matter clearly should be excluded under § 7422(b). Although we question whether this language requires the VA Secretary to repeatedly issue 7422-determinations on the same questions, we understand that there is no 7422-determination at issue here and that question is not before us now. Furthermore, we recognize that the approach noted here is in fact consistent with the Authority's decision in *AFGE*, 61 FLRA at 571. *See VA II*, 71 FLRA at 769(c) n.12. Moreover, we hope that this decision clarifies for the parties that in the future we will not consider the technical arguments as to why an issue does or does not concern one of the limitations in § 7422(b), as those decisions are within the purview of the VA Secretary.

[31] In conjunction with the above discussion, we deny the Agency's exception that the award is contradictory to Article 43, Section 2(C) of the CBA, which restates § 7422(b), because the grievance concerns direct patient care and compensation and is thus excluded from the grievance procedure. Exceptions at 8. As noted above, Article 43, Section 2(C) of the CBA also states that "[t]he language in the above paragraph shall only serve to preclude a grievance where the Secretary, or a lawfully appointed designee of the Secretary (currently the Under-Secretary for Health), determines in accordance with 38 [U.S.C. §] 7422 that the grievance concerns or arises out of one or more of the three items listed above [from § 7422(b),]" and that did not occur here. CBA at 228-29. In addition, the Agency argues that the award is contrary to law because "[t]he [A]rbitrator exceeded his authority by disregarding limitations on his authority under 38 U.S.C. § 7422." Exceptions at 6. We now agree with the Agency that the Arbitrator should not have discussed whether the grievance was barred under § 7422(b). However, under the particular facts of this case, because the Arbitrator did *not* find that the grievance concerned a matter under § 7422(b) and correctly went on to resolve the grievance in this case, we deny the Agency's exception.

[32] Exceptions at 10; *see also supra* note 4 (jointly proposed issue statement versus the re-framed issue). As relevant here, the Authority has found that arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration or resolve an issue not submitted to arbitration. *AFGE, Loc. 1770*, 67 FLRA 372, 373 (2014) (citing *AFGE, Loc. 1617*, 51 FLRA 1645, 1647 (1996)).

[33] Exceptions at 10.

[34] *Id.* at 11. The Agency also notes that "Article 35 [regarding rest and relaxation] was never mentioned in the Step 3 [g]rievance from the Union." *Id.* However, the Agency fails to explain the significance of this and, in any event, the grievance does in fact mention rest and relaxation. Exceptions, Attach. 2, Joint Ex. 4, Union Grievance (Grievance) at 3 ("Resolution . . . [t]he [A]gency provide the providers a day off for rest and relaxation"); Award at 3.

[35] *See* 5 C.F.R. § 2425.6(e)(1) ("An exception may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground as required in paragraphs (a) through (c) of this section"); *NAIL, Loc. 5*, 70 FLRA 550, 552 (2018) (denying an exceeds exception as unsupported under § 2425.6(e)(1)); *AFGE, Loc. 1633*, 64 FLRA 732, 733-34 (2010) (denying an exceeds exception because the union's argument was without foundation).

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's contrary-to-law arguments.

The Agency argues that parts of the Arbitrator's awarded remedies are contrary to law.[36] Specifically, the Agency asserts that "[t]he [A]rbitrator's award conflicts with 5 [U.S.C.] § 7106(a)(2)(B) as the requirements to adjust tours and orders to authorize [rest and relaxation] periods impact when work assignments will occur and to whom duties will be assigned."[37]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not presented to the Arbitrator.[38] The Agency concedes that it did not raise this management's rights argument before the Arbitrator, but argues that "this was not raised . . . because it was not foreseen that the [A]rbitrator would order the adjustment of physicians['] duty hours."[39] However, we find that the record reflects that the Agency was on notice that the Union was grieving the Agency's scheduling of the grievants for rounding duties over and above their regular forty-hour workweek as defined in the VA Handbook.[40] The Arbitrator stated in the award that the Union "believe[d] that the Agency [could] figure the rounding into the schedules that are made up in sufficient time to give physicians relief from the long hours spent in rounding."[41] Furthermore, the Union requested rest and relaxation time as a remedy in its grievance.[42] Therefore, because the Agency could have raised the argument that adjusting scheduling to include rounding duties within the forty-hour workweek and ordering the Agency to authorize rest and relaxation time would infringe on management's right to assign work, but did not do so, we will not consider this argument now. We dismiss this exception.[43]

## V. Decision

The Union's motion for reconsideration is granted. The Agency's exceptions that were not considered in *VA* are denied, in part, and dismissed, in part.

[36] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any questions of law raised by the exception and the award de novo; in doing so, it determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. But the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts. *U.S. DOD, Educ. Activity*, 71 FLRA 373, 375 (2019) (then-Member DuBester concurring in part and dissenting in part) (citing *U.S. Dep't of State, Bureau of Consular Affs., Passport Serv. Directorate*, 70 FLRA 918, 919 (2018)).

[37] Exceptions at 6.

[38] *See* 5 C.F.R. § 2429.5 ("The Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the . . . arbitrator.").

[39] Exceptions at 6.

[40] Grievance at 2 (alleging that the Agency "has been scheduling providers to work more than [forty] hours per week or [eighty] hours within a two[-]week pay period, by scheduling the providers to perform roundings on a scheduled rotation"); Award at 9 (quoting the VA Handbook as providing, in part, that, for healthcare providers, "the basic workweek consists of a [forty]-hour tour of duty during the administrative workweek (i.e., Sunday through Saturday)"). Furthermore, the Arbitrator summarized the Union's position as including the argument that the VA Handbook compelled the Agency to not schedule grievants to work more than forty hours per week. *Id.* at 18.

[41] Award at 18. In its post-hearing brief, the Agency even summarizes a Union argument that "when you [the Agency] schedule them to do their Saturday rounding and Sunday rounding, why does that not all encompass [forty] hours according to the handbook?" Exceptions, Attach. 5, Agency Post-Hr'g Br. (Agency Post-Hr'g Br.) at 7.

[42] Grievance at 3; Award at 3. At no point during the arbitration hearing or in its post-hearing brief did the Agency raise a management's rights argument, even though it had plenty of opportunity to do so. *See* Agency Post-Hr'g Br. at 4.

[43] *See U.S. Dep't of VA, VA Reg'l Office, St. Petersburg, Fla.*, 70 FLRA 799, 800 (2018) (then-Member DuBester concurring, in part, and dissenting, in part) (dismissing the agency's argument, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, that the award was contrary to a management right, because the agency could have raised its argument before the arbitrator, but it did not do so).

**Chairman DuBester, concurring:**

For the reasons expressed in my dissent in *U.S. Department of VA, John J. Pershing VA Medical Center*,[1] I agree that the Union's motion for reconsideration should be granted. I also agree that the Agency's exceeded-authority exception should be denied and its contrary-to-law exception should be dismissed.

[1] 71 FLRA 1141, 1143-44 (2020) (Dissenting Opinion of then-Member DuBester).

**Member Kiko, concurring:**

I recognize that an "issue of whether a matter or question concerns or arises out of" the statutory exclusions under 38 U.S.C. § 7422 "shall be decided by the Secretary."[1] However, I do not believe that this provision requires the Secretary to answer the same question over and over again. But after considering the motion for reconsideration, I understand that the Agency did not raise the specific argument that I have set forth above. To the contrary, the Agency did not even bring us a § 7422 determination that the Agency contended should apply in this dispute. And I recognize that we are better served by waiting for a case in which the parties have vigorously contested this point before we interpret a statutory provision of such importance. On that basis, I agree to grant the motion.

[1] 38 U.S.C. § 7422.