No. 07-1209

In The Supreme Court of the United States

JAMES B. PEAKE, M.D.,

Petitioner,

v.

WOODROW F. SANDERS,

PATRICIA D. SIMMONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICUS CURIAE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

Daniel Graham
Member, Veterans Appeals Committee of the Federal Circuit Bar Association
WILEY REIN, LLP
1776 K Street, NW
Washington, DC 20006
Telephone: (202) 719-7433

Attorneys for Amicus Curiae Federal Circuit Bar Assn.

Blair Elizabeth Taylor*
Chair, Veterans Appeals Committee of the Federal Circuit Bar Association
COVINGTON & BURLING, LLP
1201 Pennsylvania Ave., NW
Washington, D.C. 20004
Telephone: (202) 762-5669

* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

MISCELLANEOUS

BRIEF FOR AMICUS CURIAE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

THE INTEREST OF *AMICUS CURIAE*

The Federal Circuit Bar Association ("Association") respectfully submits this brief as amicus curiae in support of the veteran Respondents.[1]

The Association is a well-respected bar organization, drawing its membership from government, industry and private practice attorneys whose expertise falls within the jurisdiction of the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). The Association and its members share a substantial interest in the adjudication of significant issues defining the laws interpreted by the Federal Circuit. The case at bar presents such an important issue, specifically the criteria for applying the "rule of prejudicial error" in the context of veterans law. This issue is highly important to our veterans and their families seeking

---

[1] This amicus curiae brief is presented by the Federal Circuit Bar Association under Supreme Court Rule 37.3(a). The parties have consented to the filing of this amicus curiae brief. The letters of consent from the parties are filed herewith. In accordance with Supreme Court Rule 37.6, amicus curiae states that no counsel for a party authored any part of this brief. Only this amicus curiae made a monetary contribution to the preparation and submission of this brief. Counsel for amicus curiae prepared this brief on a pro bono basis.

fair and efficient adjudication of their claims for benefits. The Association seeks to assist the Court by identifying legislative and practical factors that may influence its consideration of precedent when applying the "rule of prejudicial error" in view of 38 U.S.C. § 5103(a).

STATEMENT OF THE CASE

Respondent veteran Woodrow F. Sanders filed a claim for service-connected disability benefits for injuries sustained while on active duty in the United States Army. The relevant Regional Office ("RO") of Department of Veterans Affairs ("VA" or "Agency") denied his claim, but failed to provide adequate notice as to who was responsible for providing evidence necessary to substantiate the claim prior to denying it. In doing so, the VA violated the notice provision of the Veterans Claims Assistance Act of 2000 ("VCAA"), Pub. L. No. 106-475, 114 Stat. 2096, the notice provision being codified at 38 U.S.C. § 5103(a) (2006). Mr. Sanders appealed to the VA's Board of Veterans Appeals ("Board"), which agreed with the determination made by the RO, and denied Mr. Sanders' appeal.

The veteran filed an appeal with the U.S. Court of Appeals for Veterans Claims ("Veterans Court"), arguing, inter alia, that the VA failed to abide by the notice provision of the VCAA. The Veterans Court denied Mr. Sanders' appeal because he did not demonstrate how he was prejudiced by the VA's failure to notify him of who would be

responsible for providing evidence necessary to substantiate his claim for benefits.

Mr. Sanders appealed the Veterans Court decision to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). Finding that all VCAA notice errors should be presumed to be prejudicial to our veterans, the Federal Circuit reversed the Veterans Court's denial of Mr. Sanders' claim and remanded his case for further adjudication. This Court granted Secretary Peake's request for review of the Federal Circuit's decision.

SUMMARY OF THE ARGUMENT

In passing legislation codified at 38 U.S.C. §§ 5103 and 5103A (2006), Congress articulated the VA's duty to assist veterans in obtaining duly deserved benefits. The statutes provide that upon receipt by the VA of a complete or substantially complete application for benefits, the Agency must notify the claimant of evidence needed to substantiate his claim. The notice must also identify the party responsible for supplying that evidence in view of the VA's duty to assist veterans. See 38 U.S.C. 5103(a) (2006). However, Congress did not explicitly state the criteria courts should consider in determining the procedural consequences of the VA's failure to abide by the duty to assist set forth in the VCAA, including notice failures under § 5103(a). Such considerations are within the realm of the judiciary, whose role it is to interpret laws as intended by Congress.

Upon rendering its decision denying Mr. Sanders' appeal, the Veterans Court applied its precedent developed to address the ramifications of the VA's failure to adequately provide notice pursuant to § 5103(a). That precedent apportions the burden of proving that a defective notice prejudiced the interest of the claimant, depending upon the notice error involved. One type of notice error warrants a presumption of prejudice rebuttable by the VA, while other notice errors require the veteran to prove prejudice to avoid denial of his claim. See Sanders v. Nicholson, 20 Vet App. 143, No. 03-1846, 2005 WL 2055933, at *7 (Vet. App. Aug. 25, 2005). The Veterans Court erroneously believed that this presumption properly accounted for "the rule of prejudicial error," as required by 38 U.S.C. § 7261 (b)(2) (Supp. V 2005). Id.

The Federal Circuit found this allocation of the burden of proof to be contrary to the intended purpose of the VCAA. It surmised that the Veterans Court, although well-intentioned, created a system that essentially excused the VA's failure to follow the law and penalized our veterans with a complex series of administrative hoops to navigate during the claims process. In its opinion, the Federal Circuit noted that judicial precedent regarding the treatment of prejudicial error under the Administrative Procedures Act ("APA"), codified at 5 U.S.C. § 706 (2007), is not dispositive in the unique setting of veterans law. Sanders v. Nicholson 487 F.3d 881, 891 (Fed. Cir. 2007).

In view of the importance of veterans affairs and the evolution of the statute, the Association believes that the Federal Circuit properly considered Congressional intent in fashioning a remedy for the VA's failure to follow the notice requirement of the VCAA. The legislative history makes clear that the Agency must bear the burden of its errors – not our veterans. In Section I, the Association discusses several Congressional statements articulating the purpose of the VCAA and the criticality of the notice component to its implementation. In Section II, the Association explains why the unique nature of the veterans claims process necessitates flexible interpretation of 38 U.S.C. § 7261 (b)(2). Section III discusses how the Federal Circuit's presumption of prejudice takes "due account" of the rule of prejudicial error in the unique context of VCAA notice violations. The Association respectfully asks this Court to consider the legislative history unique to veterans law when evaluating judicial precedent applying the rule of prejudicial error.

ARGUMENT

I. NOTICE REQUIRED BY THE VCAA IS A CRITICAL COMPONENT OF THE UNIQUELY PRO-CLAIMANT VETERANS BENEFITS REGIME.

Congress enacted the VCAA in an effort to, inter alia, reaffirm that the laws providing for

veterans' benefits and their administration by the VA are unique within our nation's extensive network of statutory schemes:

> [T]he Department of Veterans Affairs' system for deciding benefits claims is unlike any other adjudicative process. It is specifically designed to be claimant friendly. It is non-adversarial; therefore, the VA must provide a substantial amount of assistance to a veteran seeking benefits.

H.R. Rep. No. 106-781 at 5 (internal quotation marks omitted).[2] These values were at the heart of the Federal Circuit's ruling in Sanders. 487 F.3d at 889 ("The Veterans Court, however, erred by not giving sufficient weight to the importance of claimant participation to the VA's uniquely pro-claimant benefits system."). Indeed, long before Sanders, the Federal Circuit had recognized the "uniquely pro-claimant" nature of the veterans benefits system. See Hensley v. West, 212 F.3d 1255, 1262 (Fed. Cir. 2000).

Although the Government seizes upon the words "reaffirmation" and "clarification" in the VCAA to dismiss the significance of this statute in shaping veterans law, Pet.'s Br. at 20, the Government fails to appreciate the profound importance of the values that Congress sought to

---

[2] All emphasis in this brief is added unless otherwise indicated.

reaffirm in passing this Act in 2000. The VCAA's legislative history makes clear that the paternalistic, pro-claimant nature of the veterans benefits system needed "reaffirmation" because intervening case law had created barriers to the fulfillment of the VA's duty to assist veterans in the development of their claims.

Specifically, Congress crafted the VCAA in order to blunt the impact of Morton v. West, 12 Vet. App. 477 (1999), a decision that precluded the VA from assisting veterans until they submitted a "well-grounded" claim. Id. Congress felt that this "well-grounded" claim requirement was a significant hurdle that precluded many veterans from substantiating their claims for benefits: "As a result of court decisions construing the meaning of section 5107 of title 38, United States Code, concerning 'well-grounded' claims and the Secretary's 'duty to assist' a veteran in obtaining evidence in support of a claim, the VA is no longer able to provide assistance to veterans as it has in the past." H.R. REP. NO. 106-781 at 5 (2000); see also 146 CONG. REC. 22,886 (Oct. 17, 2000). Congress never intended our veterans laws to make access to VA benefits burdensome, and it was troubled by the mischief caused by Morton.

Indeed, when it promulgated rules implementing the VCAA, the VA understood what was already apparent to practitioners in the area of veterans benefits law (including members of the Association), i.e., that the VCAA fundamentally

changed the manner in which claims were processed. Those changes were manifested by, inter alia, requiring early notice to veterans so as to ensure proper development of their claims records. Specifically:

> The VCAA's legislative history indicates that Congress intended the new law to improve the efficiency of the adjudication process and the process by which subsequent claims for rating increases or service connection for additional conditions are handled, by ensuring proper development of the record when the claimant first submits an application for benefits. 146 Cong. Rec. S9211, S9212 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller). The drafters wanted claimants to know early in the claim process what was necessary to substantiate their claims. Therefore, the VCAA was drafted to impose on VA the duty to issue section 5103(a) notice early in the claim process.

Notice and Assistance Requirements, 71 FED. REG. 63,732, 63,733 (proposed Oct. 31, 2006).

The VA's comments on the importance of the VCAA's notice requirements are consistent with the statute's legislative history. The VCAA was deemed necessary in the wake of Morton because "[t]his and previous court decisions construing the meaning of

section 5107 of title 38, United States Code, have constructed a **significant barrier** to veterans who need assistance in obtaining information and evidence in order to receive benefits from the VA." 146 CONG. REC. 22,886 (Oct. 17, 2000). In providing the history leading up to the VCAA, Congressman Lane Evans commented that

> Last fall, after the Department of Veterans Affairs (VA) implemented the Morton v. West decision of the United States Court of Appeals for Veterans Claims, I introduced H.R. 3193, the Duty to Assist Act. This legislation was intended to correct erroneous interpretations of law. Judicial review was intended to continue VA's long standing obligation to assist all veterans with the development of their claims. Under the Morton decision, the exact opposite occurred.

146 CONG. REC. 22,889 (Oct. 17, 2000).

Congressman Evans went on to say that the compromise legislation being considered that day, H.R. 4864 (the VCAA), incorporated the critical provisions of the initial bill he crafted to address the detrimental effects of Morton on the veterans claims process. The House further explained that the notice provisions of the VCAA were a critical part of Congress's effort to reaffirm and revitalize the VA's duty to assist:

> The compromise agreement enhances the notice that the Secretary is now required to provide to a claimant and the claimant's representative regarding information that is necessary to complete the application. The notice would inform the claimant what information (e.g. Social Security number, address, etc.), and what medical evidence (e.g. medical diagnoses and opinions on causes or onset of the condition, etc.) and lay evidence (e.g. statements by the veteran, witnesses, family members, etc.) is necessary to substantiate the claim. The notice would also specify which portion of this information and evidence is to be provided by the Secretary or by the claimant.

146 CONG. REC. 22,887 (Oct. 17, 2000). Such legislation was necessary, according to Congressman Evans, because the notices provided to veterans by the VA often did not contain clear information enabling veterans to understand what actions the Agency had taken on their behalf, what actions the Agency would take in the future, and what information or evidence the veterans should supply to substantiate their claims. 146 CONG. REC. 22,889 (Oct. 17, 2000). Mr. Evans encouraged the VA to develop communications with veterans "using plain, understandable English" to make the notice process

transparent. 146 CONG. REc. 22,891 (Oct. 17, 2000). As explained by Congressman Evans:

> I strongly believe in judicial review. However, courts can - and do - make erroneous decisions. When those decisions affect the *fundamental rights of veterans*, it is Congress' responsibility to correct the problem. H.R. 4864, as amended, will do this.

146 CONG. REC. 22,890 (Oct. 17, 2000).

Thus, in crafting the VCAA, Congress attempted to correct the negative effects of judicial intervention in the claims process for veterans benefits by, inter alia, expressly codifying the notice requirement now at issue in this case. The legislative history demonstrates that the notice process, described as part of the "fundamental rights of veterans," should be clear and understandable, keeping in line with the objective of the VCAA to facilitate VA assistance of veterans in substantiating their benefits claims.

II. THE UNIQUE NATURE OF VETERANS BENEFITS NECESSITATES FLEXIBLE INTERPRETATION OF 38 U.S.C. § 7261(B)(2).

38 U.S.C. § 7261(b)(2) requires the Veterans Court to "take due account of the rule of prejudicial error." The statute does not allocate the burden of

proof on the issue of prejudice, nor does it suggest that the "rule of prejudicial error" will be applied in the same manner in all appeals. To the contrary, Congress's use of the phrase "due account" demonstrates that Congress understood that the rule would be applied differently in different situations. This understanding is reinforced by judicial interpretation of similar language in the Administrative Procedure Act, which provides that "due account shall be taken of the rule of prejudicial error." See 5 U.S.C. § 706. As Respondent Simmons has demonstrated, the "due account" taken of the rule of prejudicial error in APA appeals is flexible and context-specific, and Courts have required agencies to establish harmlessness in certain instances. Simmons Br. in Opp. at 8-11. Thus, the Federal Circuit correctly concluded that the text of § 7261(b)(2) left the Veterans Court with "considerable latitude as to how to take due account of the rule of prejudicial error." Sanders, 487 F.3d at 891 (quoting Mayfield v. Nicholson, 19 Vet. App. 103, 114 (2005)). The "account" that is "due" to the rule of prejudicial error under veterans law must necessarily consider the uniquely pro-claimant nature of the veterans benefits system and Congress's express desire to remove obstacles to the processing of claims.

Historically, our courts and agencies have relied on "the purpose and context of the statutory provision to glean the intent of Congress" in understanding a given statutory scheme. 3 Charles H. Koch, ADMINISTRATIVE LAW AND PRACTICE § 12.34[4] at 276 (2d ed. 1997). As Koch notes, "[t]he

court is to assure that the agency carries forward each intended purpose to the extent possible." Id. The D.C. Circuit Court of Appeals has recognized this principle, acknowledging that "if the agency 'does not reasonably accommodate the policies of a statute or reaches a decision that is 'not one that Congress would have sanctioned,' … a reviewing court must intervene to enforce the policy decisions made by Congress.'" Environmental Defense Fund v. EPA, 852 F.2d 1316, 1326 (D.C. Cir. 1988) (internal citations omitted). Therefore, in reviewing appeals pertaining to benefits claims, our courts should interpret veterans laws such that they are applied as intended by Congress, i.e., to avoid constructing "significant barriers" to substantiating benefits claims and "to continue VA's long standing obligation to assist all veterans with the development of their claims." 146 CONG. REC. 22,886, 22,889 (Oct. 17, 2000).

A. The Veterans Court Misapplied 38 U.S.C. § 7261(B)(2) In View of the APA, Frustrating the Purpose of the VCAA.

The decision affirming the Board's handling of Mr. Sanders' claim is another example in which the Veterans Court, in the words of Congressman Evans, rendered an "erroneous decision" negatively affecting the "fundamental right[]" of our veterans to have VA assistance in substantiating their claims for benefits. Just as it did in Morton, the Veterans Court erred in Sanders when it interpreted the VCAA notice

provision to erect yet another barrier for claimants to overcome when seeking benefits.

The VA implemented the statutory notice requirement of 38 U.S.C. § 5103(a) by Agency regulation. See 38 C.F.R. § 3.159(b)(1) (2008). This regulation divides the notice requirement of the VCAA into four separate elements: 1) notice of what information or evidence not already of record is necessary to substantiate the claim; 2) notice of what subset of the necessary information or evidence, if any, that the claimant is to provide; 3) notice of what subset of the necessary information or evidence, if any, that the VA will attempt to obtain; and 4) a general notification that the claimant may submit any other evidence he or she has in his or her possession that may be relevant to the claim. See, e.g., Sanders, No. 03-1846, 2005 WL 2055933, at *7.

The Federal Circuit has acknowledged that VCAA notice errors are reviewed by the Veterans Court in accordance with 38 U.S.C. § 7261(b)(2), which directs the Veterans Court to "take due account of the rule of prejudicial error." Conway v. Principi, 353 F.3d 1369, 1374 (Fed. Cir. 2004). Although its opinion was well-intended, problems arose when the Veterans Court attempted to take "due account" of prejudicial error by assessing the worthiness of VCAA notice errors in view of APA precedent in Mayfield v. Nicholson, 19 Vet. App. 103 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006). The Mayfield decision held that first-element notice errors were deemed to be the most

grave, and any prejudice to the veteran arising from these errors is presumed. However, ostensibly because of APA precedent, the Veterans Court determined that notice errors 2-4 were not worthy of the presumption, meaning that veterans must demonstrate prejudice from the Agency's defective notice practice in order to further adjudicate their claims for benefits.

This is the logic that begat the inappropriate outcome of Mr. Sanders' appeal from the Board to the Veterans Court. Because Mr. Sanders did not allege a first-element notice error, and because he did not delineate how he was specifically prejudiced by the VA's notice error, the Veterans Court affirmed the Board's decision to deny Mr. Sanders' claim for benefits. Thus, Mr. Sanders was blocked from further consideration of his claim due to a procedural violation of the VCAA by the Agency. This result not only frustrates the very purpose of the VCAA - i.e., Agency assistance of veterans - but actually rewards the DVA for not following the law. The Agency should not be permitted to summarily eliminate claims by ignoring statutes and regulations. Yet the APA need not be construed such that its precedent eviscerates the VCAA in this stark manner.

B. General APA Precedent Should Not Bind Veterans Law Determinations.

The APA "sets forth standards governing judicial review of findings of fact made by federal administrative agencies." Dickinson v. Zurko, 527 U.S. 150, 152 (1999). There is no doubt that the prejudicial error rule set forth by the APA, as codified in 5 U.S.C. § 706, has been interpreted to require that the party challenging an agency's procedural error must demonstrate harm in order to proceed with his case. Palmer v. Hoffman, 318 U.S. 109, 116 (1943). However, cases interpreting § 706 do not control the interpretation of 38 U.S.C. § 7261 in view of the VCAA because the relationship between the VA and our veterans - a relationship contemplated by Congress when enacting the VCAA - is unique. There exists a special quid pro quo between our government and those who have sacrificed for it through military service. Congress has repeatedly affirmed the unique nature of veterans law:

> The "duty to assist," along with other principles such as giving the veteran the benefit of the doubt in benefits determinations, are parts of what make the relationship between the Department of Veterans Affairs (VA) and the claimant unique in the Federal Government. Congress has long recognized that this

> Nation owes a special obligation to its veterans. The system to provide benefits to veterans was never intended to be adversarial or difficult for the veteran to navigate.

CONG. REC. 19,229 (Sept. 25, 2000).

By contrast, there is no duty to assist, for example, patent applicants seeking Letters Patent from the United States Patent and Trademark Office ("USPTO"). No Congressional mandate exists directing patent examiners to obtain evidence and information helpful to substantiate a patent applicant's claims. Rather, patent prosecution often assumes an adversarial stance. See Hewlett-Packard Co. v. Bausch & Lomb, Inc., 116 F.R.D. 533, 543 (N.D. Cal. 1987) abrogated on other grounds, Advanced Cardiovascular Sys., Inc. v. C.R. Bard, Inc., 144 F.R.D. 372 (N.D. Cal. 1992) (reply to examiner's claim rejections intended to change examiner's mind, placing applicant in a "defensive position and in essence, in an adversary relation to the examiner"); see also J. Michael Strickland, Comments on Proposed Changes to Information Disclosure Requirements and Other Related Matters 4 (September 8, 2006), available at http://www.uspto.gov/web/offices/pac/dapp/opla/comments/ab95/gsk.pdf ("As long as the specter of inequitable conduct hangs over the prosecuting attorney, the prosecution of patent applications will, as a necessity, remain an adversarial process."). This example illustrates why the paternalistic

relationship specific to the VA and its clients sets the veterans claims process apart from other federal agency practice.

While the APA's objective is to provide a uniform platform for federal administrative agency procedures, the Act does not require rigid application of its principles. The language of 5 U.S.C. § 559 (2007) provides for exceptions to the APA's constraints on judicial review of administrative actions, although subsequent legislation modifying APA provisions must clearly indicate the basis for such exceptions. As recognized by this Court, § 559 states that the APA does not "limit or repeal additional requirements recognized by law." See Zurko, 527 U.S. at 154-55. In Zurko, this Court held that, even though exceptions to the APA's scope of review are permissible, the Federal Circuit's heightened review of USPTO actions was not a recognizable exception to the APA's standard of review pursuant to 5 U.S.C. § 559.

However, unlike the situation in Zurko, the scope of judicial review of VA determinations is not subject to the APA, because Congress carved out a specific statute covering this aspect of claims proceedings, namely 38 U.S.C. § 7261. Nonetheless, if subject to the APA, the VCAA - which was plainly intended to enhance the VA's duty to assist veterans in substantiating their claims - would fall within the "additional requirements recognized by law" exception set forth in § 559. This explicit recognition of the importance of "additional requirements"

validates a different interpretation of "the rule of prejudicial error" in the unique context of veterans law.

C. The Rule of Prejudicial Error Should Be Applied Flexibly to Veterans Law.

As Congress has recognized, the paternalistic relationship between the VA and our veterans is like no other, and veterans laws should be interpreted to avoid distorting that relationship. Supra Section I. Accordingly, the Association believes that a flexible approach is in order for applying the "rule of prejudicial error" during judicial review of veterans claims. It is not necessary to rigidly interpret "the rule of prejudicial error" in view of APA precedent as APA precedent outside the veterans context lacks the special focus demanded by Congress when interpreting veterans statutes. Thus, to the extent that it results in an outcome inconsistent with the purpose of the VCAA, prior interpretation of the APA in non-veterans cases should not be dispositive of the proper application of the "rule of prejudicial error" in the veterans law context.

The VA is statutorily obligated to aid our veterans in obtaining benefits to care for those who have borne the battle.[3] Our courts must be mindful

---

[3] The motto of the VA, which is reproduced on a plaque at an entrance to its headquarters in Washington, D.C., recites: "to care for him who shall have borne the battle and for his widow and his orphan." Abraham Lincoln, Second Inaugural

of this special relationship when interpreting veterans law to avoid creating precedent that de facto makes the VA adversarial to veterans, or makes the benefits process difficult for our veterans to navigate. When discussing the VCAA legislation under consideration in 2000, Congressman Quinn noted that he wanted

> to make certain our colleagues understand that this is an effort by the Veterans Subcommittee on Benefits to make the VA more user friendly, more constituent friendly. When we have said so many times on the subcommittee, when there is an area that is not certain, the benefit of the doubt should always go to the veteran when we are able to do that.

CONG. REC. 16,053 (July 25, 2000). That benefit of the doubt should be a polestar guiding interpretation of the laws that govern the VA's claims process. This Court has previously followed this guidance when interpreting veterans statutes. See Brown v. Gardner, 513 U.S. 115 (1994) ("[I]nterpretive doubt is to be resolved in the veteran's favor.").

In sum, the legislative history of the VCAA crystallizes the error perpetuated by the Veterans

---

Address, in 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler, ed., 1953).

Court in its Sanders decision; by adhering to non-veterans APA precedent, the court made the claims process more onerous for our veterans, not more user friendly. In doing so, the Veterans Court failed to "enforce the policy decisions made by Congress." Environmental Defense Fund, 852 F. 2d at 1326. The Federal Circuit correctly addressed this error.

III. THE FEDERAL CIRCUIT'S PRESUMPTION OF PREJUDICE TAKES "DUE ACCOUNT" OF THE RULE OF PREJUDICIAL ERROR IN THE UNIQUE CONTEXT OF VCAA NOTICE ERRORS.

A. Requiring Veterans to Prove Prejudice Would Undermine the Nonadversarial Nature of the Veterans Benefits System.

The Federal Circuit correctly recognized that placing the burden on veterans to demonstrate prejudice would contravene "Congress's clear desire to create a framework conducive to efficient claim adjudication" and would "create[] a system that practically requires a claimant asserting a notice error to seek counsel simply to be able to navigate the appeal process." Sanders, 487 F.3d at 889. The Federal Circuit's reasoning is entirely valid. The Veterans Court decision in Sanders would require veterans to demonstrate prejudice arising from VA notice violations in order to pursue their benefits

claims. Assistance of counsel will surely be necessary to prove such prejudice.

A statutory interpretation under which veterans will require counsel to navigate the system is plainly wrong. As the Government recognizes, this Court has held that "the VA's administrative claims-adjudication process is nonadversarial and is 'designed to function throughout with a high degree of informality and solicitude for the claimant.'" Pet.'s Br. at 24 (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 311 (1985)).

Congress not only designed the veterans benefits system to operate without the need for attorneys, the system until recently actually discouraged the retention of attorneys whose fees might consume part of a veteran's benefits:

> The Government interest, which has been articulated in congressional debates since the fee limitation was first enacted in 1862 during the Civil War, has been this: that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer.

Walters, 473 U.S. at 321. Attorney representation before the VA, while permissible, should not be made a de facto requirement by a judicial misreading of statutory language.

The Government argues that there is no need for attorney representation before the VA because of the non-adversarial nature of the veterans claims process. In arguing that proceedings before the Veterans Court - unlike those before the VA - are intended to be adversarial, thereby distinguishing the need for representation in court as opposed to during Agency proceedings, the Government misses the point. Pet's. Br. at 24-25 Any violation of the VCAA's notice requirements necessarily occurs at the *outset* of the administrative process, which the Government concedes should be non-adversarial. Id. at 24. Requiring veterans to demonstrate prejudicial error from such a violation would necessitate retention of counsel by claimants during proceedings before the RO and the Board in order to (1) identify the occurrence of the error, and (2) create a record that will allow them to demonstrate prejudice on appeal. Such a requirement would not only frustrate Congress's recognized interest in a nonadversarial adjudication process, it could dilute the benefits available to a needy veteran by diverting some of them to attorneys. See Walters, 473 U.S. at 321.

Moreover, retaining counsel on appeal to the Veterans Court will not permit the veteran to carry the burden the Government would place on him - at that point, the record on appeal is closed. 38 U.S.C.

§ 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."); accord id. § 7261(b); Bonhomme v. Nicholson, 21 Vet. App. 40 (2007) ("The authority of the Court, which - as noted above - is not part of the Agency, is limited to reviewing the correctness of the Agency's factual and legal conclusions based on the record before the Agency *at the time of its decision*." (emphasis in original)).[4] Instead, retention of counsel would be needed at the Agency level to identify the error and craft a record sufficient to demonstrate prejudice. This creates precisely the anomaly predicted by the Federal Circuit. Sanders, 487 F.3d at 889.

In Sanders, the Federal Circuit properly recognized that the legal and factual issues relevant to a showing of prejudice are generally obscure rules of appellate procedure that would not be intelligible to a veteran unassisted by counsel. Sanders at 889-90 (noting that "the system articulated by the Veterans Court requires a claimant, simply in order to rectify the VA's failure to comply with its statutorily mandated responsibilities, to . . . figur[e] out what it means to 'affect the essential fairness of the adjudication'"). Veterans benefits claims often deal with complicated medical and technical issues.

---

[4] Although the Veterans Court is permitted to "go outside of the facts as found by the Board to determine whether an error was prejudicial," the Court's review is still limited to "'the record of the proceedings before the Secretary and the Board.'" Mlechick v. Mansfield, 503 F.3d 1340, 1345 (Fed. Cir. 2007) (quoting 38 U.S.C. § 7261(b)(2)).

In light of the VCAA, there is no justifiable rationale for introducing yet another layer of complexity into the process by imposing a burden to demonstrate prejudicial error. See Pet's. Br. at 25. If required to prove prejudice, many veterans may find it physically or financially impossible to secure the services of an attorney to overcome the burden, and may, consequently, forfeit their claims.

B. The Federal Circuit Properly Required the Government to Prove Harmlessness Because VCAA Notice Errors Have the Natural Effect of Prejudicing Veterans' Substantial Rights.

The Federal Circuit properly recognized that, "'[i]f the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, [then] the burden of sustaining a verdict will . . . rest upon the one who claims under it.'" Sanders, 487 F.3d at 889 (quoting Kotteakos v. United States, 328 U.S. 750, 760 (1946)). The Government argues that the Federal Circuit misapplied this rule in three respects: First, it argues that Kotteakos does not apply because veterans benefits claims do not involve "an individual's loss of liberty," but rather "administrative adjudication of an entitlement to monetary benefits," which the Government equates with "'mere civil liability.'" Pet.'s Br. at 27-28 (quoting O'Neal v. McAninch, 513 U.S. 432, 440 (1995)). Second, the Government argues that the rule in Kotteakos does not apply to judicial review of

agency action. Pet.'s Br. at 28-29. Finally, the Government argues that VCAA notice errors do not have the natural effect of prejudicing veterans' substantial rights. Id. at 30-35. The Government's argument is incorrect on all three points.

First, the Federal Circuit correctly observed that "[t]he fact that Kotteakos involved a criminal matter is immaterial, as 'precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights.'" Sanders, 487 F.3d at 889 (quoting O'Neal, 513 U.S. at 441). The Government attempts to avoid this result by equating veterans benefits claims with cases involving "mere civil liability," in which, as stated in O'Neal and Kotteakos, the appellant bears the burden of demonstrating prejudice. Pet.'s Br. at 27-28; O'Neal, 513 U.S. at 440; Kotteakos, 328 U.S. at 763 (stating that the statute in that case "did not require the same judgment in such a case as one involving only some question of civil liability").

A veteran's entitlement to disability compensation, however, is fundamentally more important than simply "some question of civil liability." Kotteakos, 328 U.S. at 763. The covenant between this Nation and its veterans is reflected in the VA's own motto: "to care for him who shall have borne the battle and for his widow and his orphan." Http://www1.va.gov/opa/feature/celebrate/vamotto.asp; see also n.3. It is further reflected in the "uniquely pro-claimant" regime that Congress

has created to administer veterans benefits, one which "imposes on the Board an obligation to 'fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'" McGee v. Peake, 511 F.3d 1352, 1357 (Fed. Cir. 2008) (quoting H.R. REP. NO. 100-963 at 13, reprinted in 1988 U.S.C.C.A.N. 5782, 5795). As one Judge on the Federal Circuit has observed:

> The benefits administered by the Secretary are an entitlement by which the Nation keeps its commitment to our veterans who have sacrificed to protect and defend our freedom. Thus, Congress . . . recognizes the value of demonstrating to veterans—to all those currently serving in our military and to those who may serve in the future—that America honors its commitments to those who have served.

Cook v. Principi, 318 F.3d 1334, 1358 (Fed. Cir. 2003) (Gajarsa, J., dissenting).

Thus, the fact that a veteran's livelihood—as opposed to his liberty—is at stake, provides no suitable basis for dismissing veterans' disability claims. See 38 C.F.R. § 4.1 (stating that VA disability ratings "represent as far as can practicably be determined the average impairment in earning capacity" resulting from the veteran's service-connected disability). The Federal Circuit properly looked to these cases for guidance in allocating the

burden of proof regarding prejudice in appeals before the Veterans Court.

Second, the Government suggests that the rule in Kotteakos should not apply to judicial review of agency action, as opposed to trial court judgments. Pet.'s Br. at 28-29. The Association agrees that it is important to observe "vital differentiations between the functions of judicial and administrative tribunals," FCC v. Pottsville Broad. Co., 309 U.S. 134, 144 (1940), but in this case, those differences support the Federal Circuit's ruling. Unlike a trial record, a veterans claims record is controlled exclusively by the VA. Indeed, in the "uniquely pro-claimant" statutory scheme for veterans benefits, McGee, 511 F.3d at 1357, the VA's duty to assist requires the VA to develop the record on the veterans' behalf before making a decision on the veteran's claim. Id.; 38 U.S.C. § 5103A (obligating the VA to obtain records and other information for the veteran).

Unlike a trial setting, where a party will rely on his or her own counsel to ensure that the factual record is complete, veterans usually rely on the VA's duty to assist them in adequately developing their claims records. Kelly v. Nicholson, 463 F.3d 1349, 1353 (Fed. Cir. 2006) (observing that "veterans generally are not represented by counsel before the RO and the board"). The Federal Circuit understood this, and correctly recognized that the notice required by the VCAA is intended to "afford[] a claimant a meaningful opportunity to participate

effectively in the processing of his or her claim" by allowing the veteran to introduce additional evidence into the record. Sanders, 487 F.3d at 889; see also id. at 886. Thus, far from overlooking "vital differentiations between the functions of judicial and administrative tribunals," Pottsville Broad., 309 U.S. at 144, these differences go to the heart of the Federal Circuit's ruling.

The Government's reliance on "ordinary civil cases" in which the appellant failed to provide an adequate record on which prejudice could be determined is therefore misplaced. Pet.'s Br. at 29-30 (citing, inter alia, Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1239 (10th Cir. 1999)). The record on appeal before the Veterans Court is the record created by the VA - ostensibly for the veteran's benefit. 38 U.S.C. § 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."); accord id. § 7261(b). In VCAA notice error cases, that record is one to which the veteran has not been given a meaningful opportunity to contribute. Sanders, 487 F.3d at 891. The Federal Circuit correctly concluded that requiring the veteran to prove prejudice in such a case would "frustrate[] the very purpose of the notice." Id.

These points also dispose of the Government's third argument, which is that VCAA notice errors do not have the "natural effect" of prejudicing a veteran's "substantial rights" as contemplated by Kotteakos. 328 U.S. at 760; Pet.'s Br. at 30-35. As

discussed in Section I, supra, Congress required this notice to overcome judicially created obstacles, as a result of which "the VA [was] no longer able to provide assistance to veterans as it ha[d] in the past." H.R. REP. NO. 106-781 at 5 (2000); see also 146 CONG. REC. 22,886 (Oct. 17, 2000). Indeed, when it promulgated rules implementing the VCAA's notice requirements, the VA itself recognized that this notice was necessary to "ensur[e] proper development of the record when the claimant first submits an application for benefits." Notice and Assistance Requirements, 71 FED. REG. 63,732, 63,733 (proposed Oct. 31, 2006). VA notice errors preclude this insurance, eroding the fundamental fairness of the claims proceeding.

Our government has a long standing interest in the welfare of veterans, providing them treatment different from that provided to non-veterans under similar circumstances. The legislative history of the VCAA demonstrates 1) that Congress classifies veterans as a special group of governmental beneficiaries, and 2) that the notice process, described as part of the "fundamental rights of veterans," 146 CONG. REC. 22,890, was intended to facilitate VA assistance of this special group in substantiating their claims for benefits. Indeed, this Court has recognized that "'a person in jeopardy of serious loss (must be given) notice of the case against him and opportunity to meet it.'" Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (internal citation omitted). Here, as in Mathews, the basic principle of notice is "the opportunity to be heard 'at a

meaningful time and in a meaningful manner.'" Id. at 333 (internal citation omitted). Accordingly, the "fundamental rights" of veterans, including proper notice pertaining to benefits claims, must be protected.

Thus, by presuming that VCAA notice errors result in prejudice unless shown to be harmless, the Federal Circuit simply accepted Congress's legislative determination that this notice was necessary to ensure proper and fair development of the record. 71 FED. REG. at 63,733. The Federal Circuit therefore correctly concluded that, "the natural effect of such an error would 'constitute a failure to provide a key element of what it takes to substantiate [the] claim, thereby precluding [the appellant] from participating effectively in the processing of her claim,' defeating the very purpose of § 5103(a) notice." Sanders, 487 F.3d at 890 (quoting Mayfield, 19 Vet. App. at 122).[5] Tellingly, nothing in the Government's brief answers the Court's common-sense question: "If Congress felt that such notice elements were not necessary to allow the claimant to effectively participate in the

[5] Sanders made this statement in the context of first-element notice errors, but correctly recognized that the same reasoning applied to second-, third-, and fourth-element notice errors as well. 487 F.3d at 890 ("Congress clearly viewed the claimant's participation as essential to processing his or her claim for VA benefits, and believed that the claimant should be notified which evidence he or she was responsible for providing and which evidence the government was responsible for providing.").

proceeding of his or her claim, then why would it have required them as part of the notice pursuant to § 5103(a)?" Id. at 891.

C. The Rebuttable Presumption Established by the Federal Circuit Takes Due Account of the Rule of Prejudicial Error.

The Federal Circuit in Sanders crafted an efficient and reasonable solution to the problem created by the VA's failure to give veterans the notice mandated by Congress. Under Sanders, the "rule of prejudicial error" continues to apply in all cases - the Veterans Court will not reverse a decision of the Board unless the error is one that is "significant to the outcome of the matter." Sanders, 487 F.3d at 891 (quoting S. REP. NO. 100-481 at 62 (1988)). Sanders simply accepted Congress's judgment regarding the significance of early and adequate notice to veterans and created a rebuttable presumption that such errors are prejudicial.

In fact, the VA has successfully rebutted this presumption on several occasions in the year since Sanders was decided. See, e.g., Salvania v. Peake, No. 05-2116, 2008 WL 1959467 at **3-4 (Vet. App. May 6, 2008); Fitz v. Peake, No. 05-3464, 2008 WL 2128227 at **3-4 (Vet. App. Feb. 21, 2008); Strock v. Peake, No. 05-3560, 2008 WL 566394 at **2-3 (Vet.App. Feb. 7, 2008). These cases refute any suggestion that Sanders eliminated the rule of prejudicial error from veterans decisions.

The Government correctly observes that "the informal and non-adversarial process for adjudicating claims for veterans benefits provides many procedural safeguards that have the potential to cure any defect in the initial Section 5103(a) notice." Pet.'s Br. at 31-35. This observation, however, does not support the Government's argument, and is in fact entirely consistent with the Federal Circuit's holding in Sanders. That the VA might subsequently cure a VCAA notice error by some other means does not undermine Congress's determination that proper notice is necessary to "ensur[e] proper development of the record when the claimant first submits an application for benefits." Notice and Assistance Requirements, 71 FED. REG. at 63,733. If anything, these curative safeguards justify placing the burden on the VA to prove that information required under the VCAA was provided to the veteran in some manner other than § 5103(a) notice. See Sanders, 487 F.3d at 889 (allowing the VA to rebut the presumption of prejudice "by demonstrating . . . that any defect was cured by actual knowledge on the part of the claimant").

Moreover, remands should have only a negligible impact on the VA unless the veteran submits new evidence to support his or her claim. As the Government explains, remand requires the VA "to send the case back to the regional office, provide an additional [VCAA-compliant] notice to the appellant, await a response from the appellant, and then readjudicate the remanded claim." Pet.'s Br. at 36. If, as the Government presumes, "[m]any

of those remands would be pointless because . . . the notice error would have made no difference to the outcome of the proceeding," the VA will simply reaffirm its previous decisions when no additional evidence is submitted. Id. At times, the VA may have to expend additional resources when a veteran does, in fact, submit requisite evidence identified in the notice. However, this is precisely the sort of veteran participation in the claims process that Congress sought to ensure when it initiated the notice requirement. Supra Section I.

CONCLUSION

Congress passed the notice provision of the VCAA to ensure that veterans understand what evidence and information is to be provided by the VA - as well as themselves - in order to perfect a claim for benefits. When the VA fails to provide notice in compliance with 38 U.S.C. § 5103(a), it, and not the veteran, should be obligated to bear the burden of its error. Requiring veterans to shoulder the additional responsibility of proving prejudice rewards the Agency for failing to follow the law. This simply cannot be a correct interpretation of 38 U.S.C. § 7261 (b)(2) in view of the VCAA, and is surely contrary to the very purpose for which the VCAA was enacted. Because Congress views veterans laws through a unique prism, judicial precedent interpreting the APA in non-veterans cases should not be considered dispositive by the Veterans Court when reviewing VCAA notice errors under the prejudicial error rule

of § 7261(b)(2). A flexible approach is necessary to honor Congress's intent in passing the VCAA.

Respectfully submitted,

Daniel P. Graham
Member
Veterans Appeals
Committee of the Federal
Circuit Bar Association
WILEY REIN, LLP
1776 K Street, NW
Washington, DC 20006
Telephone: (202) 719-7433

Blair Elizabeth Taylor*
Chair
Veterans Appeals
Committee of the Federal
Circuit Bar Association
COVINGTON & BURLING, LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 662-5669

Attorneys for Amicus Curiae Federal Circuit Bar Association

* *Counsel of Record*

October 21, 2008