No. 07-1209

In the Supreme Court of the United States

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

PATRICIA D. SIMMONS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, requires the Department of Veterans Affairs (VA) to provide a notice to benefits claimants. Under 38 U.S.C. 7261(b)(2) (Supp. V 2005), review of administrative decisions resolving claims for veterans benefits must "take due account of the rule of prejudicial error." The question presented is:

Whether the court of appeals erred in holding that a failure of the VA to give the notice required by the VCAA must be presumed to be prejudicial.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of James B. Peake, M.D., Secretary of Veterans Affairs, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Federal Circuit in these cases.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-21a, 56a-64a) are reported at 487 F.3d 881 and 487 F.3d

892. The decisions of the United States Court of Appeals for Veterans Claims (App., *infra*, 24a-39a, 67a-82a) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on May 16, 2007. Petitions for rehearing were denied on October 23 and 24, 2007 (App., *infra*, 22a-23a, 65a-66a). On January 14, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 20, 2008, and on February 8, 2008, the Chief Justice further extended the time to March 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 97a-99a.

STATEMENT

1. Veterans who wish to claim benefits must submit an application to the Department of Veterans Affairs (VA). See 38 U.S.C. 5100 *et seq.* Under the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, the VA is required to assist veterans in developing claims. Specifically, 38 U.S.C. 5103(a) directs that, "[u]pon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." VCAA § 3(a), 114 Stat. 2096-2097. The notice must also "indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Sec-

retary * * * will attempt to obtain on behalf of the claimant." § 3(a), 114 Stat. 2097; see 38 C.F.R. 3.159.

Veterans who are dissatisfied with the administrative resolution of their claims may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court). See 38 U.S.C. 7252. The Veterans Court has authority to "decide all relevant questions of law" and to set aside administrative factual findings that are "clearly erroneous." 38 U.S.C. 7261(a)(1) and (4) (2000 & Supp. V 2005). In reviewing an administrative decision, the Veterans Court must "take due account of the rule of prejudicial error." 38 U.S.C. 7261(b)(2) (Supp. V 2005). Decisions of the Veterans Court are subject to review in certain respects in the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over such cases. See 38 U.S.C. 7292 (2000 & Supp. V 2005).

2. a. Respondent Sanders served in the United States Army from 1942 to 1945. In 1948, he filed a claim with a VA regional office, alleging that an eye condition that he suffered had been caused by an injury sustained during his service. The claim was denied, and Sanders did not appeal. In 1991, Sanders sought to reopen his claim, relying upon statements from two ophthalmologists. The VA reopened the claim and obtained additional evidence, including a report from a VA ophthalmologist, but it ultimately denied the claim. App., *infra*, 2a-5a.

The Board of Veterans' Appeals (Board) affirmed. App., *infra*, 40a-55a. The Board noted that the medical opinions on which Sanders relied were "offered in * * * speculative language and without the benefit of consideration of relevant medical evidence." *Id.* at 54a. Conversely, the VA ophthalmologist had "affirmatively

opine[d] that [Sanders] did not lose right eye vision during service or due to the alleged in-service trauma," but that his eye condition was "most likely infectious in nature." *Id.* at 54a-55a. The Board found her opinion "to be more probative" than those of the other physicians. *Id.* at 55a.

b. Sanders appealed to the Veterans Court, arguing, among other things, that the VA had not complied with the VCAA because it had "failed to provide notice of who would ultimately be responsible for obtaining evidence necessary to substantiate the claim" and had "failed to provide proper notice before the initial unfavorable decision by the agency." App., *infra*, 38a. The court rejected that argument and affirmed the administrative decision. *Id.* at 24a-39a.

The Veterans Court applied the framework for evaluating VCAA-notice errors that it had adopted in *Mayfield* v. *Nicholson*, 19 Vet. App. 103 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006). Under *Mayfield*, a failure to inform a claimant of what evidence is necessary to substantiate his or her claim—an error that the Veterans Court referred to as a "first-element" notice error—was presumptively prejudicial. See *id.* at 122-123. But *Mayfield* held that errors in providing the other elements of the notice required by Section 5103(a) were reversible only if the appellant "identif[ied], with considerable specificity, how the notice was defective and what evidence the appellant would have provided or requested the Secretary to obtain" had appropriate notice been given, and only if the appellant could "assert, again with considerable specificity, how the lack of that notice and evidence affected the essential fairness of the adjudication." *Id.* at 121.

Because Sanders did not allege a first-element notice error, and because he did not explain how he was prejudiced by the failure of notice, the Veterans Court affirmed the Board's decision denying benefits. App., *infra*, 38a. The court did not determine whether any error had occurred. *Ibid.*

c. The court of appeals reversed. App., *infra*, 1a-21a. The court noted that 38 U.S.C. 7261(b)(2) (Supp. V 2005) requires the Veterans Court to "take due account of the rule of prejudicial error," even when evaluating claims that the VA has erred in giving the notice required by the VCAA. *Id.* at 9a; see *Conway* v. *Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004). But the court held that every VCAA-notice error should be "presumed prejudicial, requiring reversal unless the VA can show that the error did not affect the essential fairness of the adjudication," which it can do "by demonstrating: (1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law." App., *infra*, 14a-15a.

The language of Section 7261(b)(2) is virtually identical to that of 5 U.S.C. 706, the prejudicial-error rule of the Administrative Procedure Act (APA), and the court of appeals acknowledged the existence of legislative history suggesting that Section 7261(b)(2) was intended to incorporate the APA's prejudicial-error rule. App., *infra*, 20a (citing S. Rep. No. 418, 100th Cong., 2d Sess. 61-62 (1988)). Errors respecting notice, moreover, are routinely subject to analysis under the APA's rule of prejudicial error. See, *e.g.*, *American Coke & Coal Chems. Inst.* v. *EPA*, 452 F.3d 930, 939, 941 (D.C. Cir. 2006). The court nevertheless held that "the treatment of prej-

udicial error under the APA is not dispositive," because "[e]ven if Congress had previously intended veterans' claims notice errors to be assessed under the same prejudicial error rule as APA notice errors, such intent was abrogated by the subsequent passage of the VCAA." App., *infra*, 20a-21a. In the view of the court of appeals, "requiring veterans to overcome a series of complex legal hurdles in order to secure the assistance mandated by Congress would clearly frustrate the purpose of the VCAA." *Id.* at 21a.

3. a. Respondent Simmons served in the United States Navy from 1978 to 1980. App., *infra*, 57a. Upon her discharge, Simmons filed a claim for disability benefits based on hearing loss in her left ear, but the VA regional office concluded that the degree of hearing loss did not warrant compensation. *Ibid.* In 1998, she asked the VA to reopen her claim and to add a claim for compensation based on hearing loss in her right ear. *Ibid.* The regional office again denied her claim, but the Board remanded, directing the regional office to comply with the notice requirements of the VCAA, which had just gone into effect. *Ibid.* On remand, the regional office again denied the claim. *Ibid.* The Board affirmed, concluding that Simmons's left-ear hearing loss was not sufficiently severe to warrant benefits, see *id.* at 95a, and that there was no "competent evidence of a nexus between the current right ear hearing loss" and Simmons's service, *id.* at 94a.

b. Simmons appealed to the Veterans Court, which reversed the Board's decision. App., *infra*, 67a-82a. The Veterans Court determined that the VA had failed to give Simmons notice "of the evidentiary prerequisites for establishing" her claim, as required by the VCAA. *Id.* at 78a. Because that error was a "first-element" no-

tice error, the court applied a presumption of prejudice, and it imposed on the Secretary the burden of showing "that there was clearly no prejudice" to Simmons as a result of the failure to provide notice of the evidence necessary to substantiate her claim. *Id.* at 80a (quoting *Mayfield*, 19 Vet. App. at 121). The court concluded that the VA had failed to carry its burden because there was no evidence that Simmons had actual knowledge of the evidence needed to substantiate her claim or that a reasonable person would have been aware of what evidence was needed to substantiate the claim. *Id.* at 81a.

c. The Secretary appealed, and court of appeals affirmed. App., *infra*, 56a-64a. The court stated that "[o]ur opinion in *Sanders* resolves this issue" because it establishes that "once the veteran establishes that the VA has committed a VCAA notice error, the Veterans Court should presume that such error was prejudicial." *Id*. at 63a.

4. The court of appeals denied petitions for rehearing en banc. App., *infra*, 22a-23a, 65a-66a.

REASONS FOR GRANTING THE PETITION

Congress directed the Veterans Court to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2) (Supp. V 2005), and it did so by adopting the language of the APA's prejudicial-error rule, 5 U.S.C. 706. The courts of appeals are unanimous in interpreting the APA to impose upon a party challenging an agency's action the burden of showing not only that the agency erred but also that its error was prejudicial. At the time Congress enacted Section 7261(b)(2), that interpretation of the APA was already well established, and Congress was fully aware of it. In the decisions below, the Federal Circuit turned that settled construction on

its head by applying a presumption of prejudice whenever the VA fails to give a benefits claimant the notice required by the VCAA. Although the Federal Circuit has exclusive jurisdiction over veterans cases, the rule of law announced below is incompatible with the approach of other courts of appeals interpreting the virtually identical language of the APA.

Nothing in the text or history of Section 7261(b)(2) supports overriding the well-established interpretation of the rule of prejudicial error through the creation of a presumption of prejudice for VCAA-notice errors. Nor, contrary to the reasoning of the court of appeals, is there any basis for divining such a presumption from the text of the VCAA itself. That statute was simply a reaffirmation and clarification of the VA's existing claims-handling procedures, and it did not amend Section 7261(b)(2) in any way. Although the VCAA described the VA's duty to assist claimants in greater detail than prior law, it did not fundamentally alter the existing process for handling claims.

The court of appeals was similarly unjustified in claiming to find support for its decisions in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). Those cases concerned the standard of harmless-error review in criminal and habeas corpus proceedings. Such proceedings—in which an individual's liberty is at stake—are far removed from the benefits determinations at issue here and the other types of administrative determinations to which the statutory rule of prejudicial error expressly applies. *Kotteakos* and *O'Neal* are also inapposite because they considered the harmless-error rule in the context of appellate review of a lower court, which involves considerations not present in the context of judicial review of an

administrative agency determination.

The decisions below raise important issues because requiring the VA to establish a lack of prejudice in each case of VCAA-notice error will further strain an already burdened appeals process by generating a large number of remands. Many of those remands will be pointless, because the claimant will not have suffered actual prejudice from the VCAA-notice error (prejudice will have simply been presumed and not disproved), and the VA will reach the same result on remand. Reconsidering those claims will nevertheless divert the attention and resources of an agency that already handles over 800,000 claims each year, delaying the resolution of other, potentially meritorious claims. This Court's review is therefore warranted in order to resolve the conflict in analysis between the decisions below and the decisions of every other court of appeals to construe the rule of prejudicial error.

A. The Decisions Of The Court Of Appeals Conflict With Decisions Of Other Courts Of Appeals Interpreting Materially Identical Language In The APA

Section 7261(b)(2) requires the Veterans Court to "take due account of the rule of prejudicial error." That statute parallels, and draws upon, the APA's prejudicial-error provision, which courts of appeals have uniformly interpreted to impose upon a party seeking to overturn an administrative decision the burden of establishing not only that the agency erred but also that its error was prejudicial. The Federal Circuit erred in disregarding the settled construction of that materially identical statutory language.

1. The prejudicial-error provision of the APA instructs reviewing courts that "due account shall be

taken of the rule of prejudicial error." 5 U.S.C. 706. Every court of appeals to consider the question has interpreted Section 706 to "require[] the party asserting error to demonstrate prejudice from the error." *Air Canada* v. *DOT*, 148 F.3d 1142, 1156 (D.C. Cir. 1998); accord *Campanale & Sons, Inc.* v. *Evans*, 311 F.3d 109, 127 (1st Cir. 2002); *American Airlines, Inc.* v. *DOT*, 202 F.3d 788, 797 (5th Cir.), cert. denied, 530 U.S. 1274, and 530 U.S. 1284 (2000); *Friends of Iwo Jima* v. *National Capital Planning Comm'n*, 176 F.3d 768, 774 (4th Cir. 1999); *Intercargo Ins. Co.* v. *United States,* 83 F.3d 391, 394 (Fed. Cir. 1996), cert. denied, 519 U.S. 1108 (1997); *Bar MK Ranches* v. *Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *City of Camden* v. *United States DOL*, 831 F.2d 449, 451-452 (3d Cir. 1987); *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981 (9th Cir.), cert. denied, 389 U.S. 913 (1967); see also *Kroger Co.* v. *Regional Airport Auth.*, 286 F.3d 382, 389 (6th Cir. 2002) ("[T]he party challenging the agency's action must show that the action had no rational basis or that it involved a clear and prejudicial violation of applicable statutes or regulations.") (quotation marks omitted); cf. *Beef Neb., Inc.* v. *United States*, 807 F.2d 712, 714 n.1 (8th Cir. 1986); *City of Frankfort* v. *FERC*, 678 F.2d 699, 708 (7th Cir. 1982).

That rule applies no differently when the alleged error involves a failure to provide the requisite notice. See *American Coke & Coal Chems. Inst.* v. *EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006); *Friends of Iwo Jima*, 176 F.3d at 774 ("the party who claims deficient notice bears the burden of proving that any such deficiency was prejudicial"). Indeed, failure to provide notice is a particularly good candidate for a finding of no prejudice, because individuals may already know relevant informa-

tion, or the factors to which notice is directed may have little relevance to a particular proceeding. See *Air Canada*, 148 F.3d at 1156-1157 (finding no prejudice where an agency made "a mid-course change in assignment of the burden of proof" in an administrative proceeding, since petitioners' explanation of what they "would have done differently had they known at the outset of the agency proceedings that they bore the burden of proof" involved presenting evidence on issues that were not "essential to the Department's determination"); see also *Community Nutrition Inst.* v. *Block*, 749 F.2d 50, 58 (D.C. Cir. 1984) (finding no prejudice where an agency relied on studies completed after the close of the comment period, because "appellants do not even suggest that the new studies were defective in any way").

2. The plain language of Section 7261(b)(2) reflects Congress's intent to adopt the rule of prejudicial error as previously established under the APA rather than to create a distinct rule applicable only in the context of appeals of VA benefits decisions. Section 7261(b)(2), which requires the Veterans Court to "take due account of the rule of prejudicial error," was enacted in 1988 (see Pub. L. No. 100-687, Div. A, § 301(a), 102 Stat. 4115, as amended by Pub. L. No. 107-330, § 401(b), 116 Stat. 2832), and is virtually identical to 5 U.S.C. 706, which provides that "due account shall be taken of the rule of prejudicial error." Congress's use of the definite article in the phrase "the rule of prejudicial error" demonstrates that Section 7261(b)(2) refers to a particular existing rule that was established and defined at the time the statute was enacted, and it forecloses any suggestion that Congress intended to establish a new, previously undefined rule. Cf. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004) (The habeas statute's "consistent use of the

definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition."); *Warner-Lambert Co.* v. *Apotex Corp.*, 316 F.3d 1348, 1356 (Fed. Cir. 2003) (Because the definite article "particularizes the subject which it precedes," the statutory phrase "'the use' refers to a specific 'use' rather than a previously undefined 'use.'"); *In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir.) (The use of the definite article in a statute calling for "interest at the legal rate" after the filing of a bankruptcy petition indicates "that Congress meant for a single source to be used to calculate post-petition interest.") (quoting 11 U.S.C. 726(a)(5)), cert. denied, 537 U.S. 1072 (2002). In other words, Congress did not merely direct the Veterans Court to disregard harmless error; it directed that court to apply a specific preexisting rule for determining whether an error is prejudicial.

This Court has held that "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)); see *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-699 (1979). Section 706 was enacted in 1946, see APA, ch. 324, § 10(e), 60 Stat. 244, and its interpretation was well settled by the time Section 7261(b)(2) was enacted in 1988. "Linguistic consistency" therefore requires the Veterans Court to apply the same rule of prejudicial error that courts apply in proceedings governed by Section 706. *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829-830

(2002) (quoting *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988)).

3. If there were any doubt as to whether Section 7261(b)(2) directed the Veterans Court to "take due account of the rule of prejudicial error" in the same manner in which "due account [is] taken of the rule of prejudicial error" under Section 706, that doubt would be eliminated by the legislative history of Section 7261(b)(2). The Senate Committee Report accompanying that provision stated that the statute "would incorporate a reference to the 'rule of prejudicial error' as included in the APA (5 U.S.C. 706)." S. Rep. No. 418, 100th Cong., 2d Sess. 61 (1988). Significantly, the report cited the Ninth Circuit's decision in *Seine & Line Fishermen's Union* for the proposition that, under the rule of prejudicial error, "a court should pass over errors in the record of the administrative proceedings that the court finds not to be significant to the outcome of the matter." *Ibid.* (citing 374 F.2d at 981). And in *Seine & Line Fishermen's Union*, the Ninth Circuit had held that "'the burden of showing that prejudice has resulted' is on the party claiming injury from the erroneous rulings." 374 F.2d at 981 (quoting *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943)). In short, far from contemplating a rule of presumptive reversal, the Committee interpreted the prejudicial-error provision to mean "that a reviewing court should consider reversal only after determining that the identified error caused substantial prejudice to the claimant's case." S. Rep. No. 418, *supra*, at 61.

4. Because the Federal Circuit has exclusive jurisdiction to review the decisions of the Veterans Court, see 38 U.S.C. 7292 (2000 & Supp. V 2005), there is no possibility of a circuit conflict arising in the specific con-

text of VCAA-notice errors. But the Federal Circuit's analysis of "the rule of prejudicial error" is incompatible with that employed by every other court of appeals to address the same issue. The Federal Circuit erred by deviating from well-established principles of judicial review of agency action and creating a special rule applicable to appeals within its exclusive jurisdiction. Cf. *MedImmune, Inc.* v. *Genentech, Inc.*, 127 S. Ct. 764, 774 (2007); *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 393-394 (2006). Its decisions create an unjustified anomaly in that they subject the determinations of one federal agency, the VA, to a standard of review different from that applied under the APA to the determinations of every other agency. This Court's review is warranted.

B. There Is No Basis For Creating A Unique Rule Of Prejudicial Error Applicable Only To VA Adjudications

The court of appeals offered several justifications for departing from long-established principles of prejudicial-error review in the context of VCAA-notice errors. None withstands scrutiny.

1. The court of appeals rejected the traditional understanding of the rule of prejudicial error because, in its view, the VCAA "substantially overhauled the administration of the VA benefits system" and created a "uniquely pro-claimant benefit system." App., *infra*, 21a. Even if that interpretation of the VCAA were correct, it would not justify the court's holding. The VCAA did not amend Section 7261(b)(2), and it said nothing at all about the standard of review of administrative benefits determinations. In light of the canon that "repeals by implication are not favored," *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532

(2007) (quoting *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981)), as well as the principle that specific statutory language prevails over a more general provision, see *NCTA* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002), the VCAA cannot be read to have altered the prejudicial-error rule.

In any event, the court of appeals' interpretation of the VCAA is not correct. Nothing in the text or legislative history of the VCAA supports the court's assessment that the statute fundamentally altered the VA's claims adjudication process. To the contrary, Section 5103 was enacted as part of a provision of the VCAA whose title made clear that it was intended to be a "reaffirmation and clarification" of the VA's existing "duty to assist" claimants. VCAA § 3(a), 114 Stat. 2096. The House Committee on Veterans' Affairs noted that the VCAA would require the VA "to notify the claimant (and the claimant's representative) of any additional information and medical and lay evidence necessary to substantiate the claim," and it explained that "[i]t is the Committee's understanding that the Secretary *currently* undertakes to provide this notification to a claimant." H.R. Rep. No. 781, 106th Cong., 2d Sess. 9 (2000) (emphasis added). In other words, the VCAA was not intended to change the VA's practice; it was merely a "codification of [the notice] requirement" aimed at ensuring "a more uniform practice of notifying a claimant of what evidence he or she must provide." *Ibid.*

In fact, as the court of appeals itself has recognized, the VCAA was enacted not to "overhaul" the VA's adjudication process, but simply to overturn the Veterans Court's decision in *Morton* v. *West*, 12 Vet. App. 477, 485 (1999), opinion withdrawn, 14 Vet. App. 174 (2000). See *Mayfield* v. *Nicholson*, 499 F.3d 1317, 1319 (Fed. Cir. 2007) ("Congress passed the legislation in response to"

the Veterans Court's decision in *Morton*.). *Morton* held that, to the extent certain VA regulations and internal policy procedures required the VA to give assistance in all cases without regard to whether a claim was well grounded, they were unenforceable. See 12 Vet. App. at 485. In the wake of *Morton*, the VA rescinded internal procedures that had instructed VA adjudicators to develop a claim fully before deciding whether it was well grounded. Congress responded by enacting the VCAA, which was intended to be restorative—*viz.*, to return VA to its pre-*Morton* practice of assisting veterans in the development of their claims. See H.R. Rep. No. 781, *supra*, at 8-9; S. Rep. No. 397, 106th Cong., 2d Sess. 21-22 (2000); 146 Cong. Rec. 19,229 (2000) (statement of Sen. Specter) ("[T]he Senate Committee on Veterans' Affairs has worked to craft * * * a legislative solution that returns VA to the pre-Morton status quo ante."); *id.* at 22,886 (2000) (statement of Rep. Stump) ("The bill addresses the Morton versus West court decision and * * * clarifies VA's duty to assist veterans with their claims."). The history of the VCAA provides no support for the court of appeals' conclusion that the VCAA overhauled the VA claims adjudication system or altered the application of the rule of prejudicial error.

2. The court of appeals also stated that requiring an appellant to show 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." App., *infra*, 16a. That theory rests on a confusion between the VA's administrative claims-adjudication process and the process of judicial review of the VA's decisions. Although the administrative pro-

cess is non-adversarial, judicial review in the Veterans Court is quite different. See *Forshey* v. *Principi*, 284 F.3d 1335, 1355 (Fed. Cir.) (en banc), cert. denied, 537 U.S. 823 (2002). The act of filing an appeal to the Veterans Court "is the first step in an adversarial process challenging the Secretary's decision on benefits" and involves a judicial mechanism that is entirely separate and distinct from the VA administrative process. *Bobbitt* v. *Principi*, 17 Vet. App. 547, 552 (2004). Before the Veterans Court, the Secretary of Veterans Affairs is "a represented appellee in an appellate court adversarial proceeding," and claimants likewise are typically represented by counsel. *Ibid*. Thus, to the extent that the court of appeals below was concerned that adherence to the rule of prejudicial error would require claimants to seek counsel before the Veterans Court, its concern overlooks the nature and typical circumstances of Veterans Court litigation.

As this Court has noted, "there are wide differences between administrative agencies and courts." *Sims* v. *Apfel*, 530 U.S. 103, 110 (2000) (quoting *Shepard* v. *NLRB*, 459 U.S. 344, 351 (1983)). The rule of prejudicial error is a limit on the exercise of *judicial* authority, and the fact that the challenged decision was reached through a nonadversarial administrative proceeding does not alter the operation of the rule that a party seeking to invoke the remedial powers of a federal court must demonstrate prejudicial error.

3. The court of appeals also claimed to find support for its holding in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). App., *infra*, 15a. Its reliance on those cases was misplaced.

a. In *Kotteakos*, this Court reviewed a federal criminal conviction for conspiracy, and it held that the district court had erred in permitting a large number of defendants to be tried together for one conspiracy when the evidence established that there were actually several separate conspiracies. 328 U.S. at 755-756. Applying the harmless-error rule of 28 U.S.C. 391 (1940)—now codified, as amended, at 28 U.S.C. 2111—the Court determined that the error was not harmless. See *Kotteakos*, 328 U.S. at 772-777. In reaching that conclusion, the Court stated that, while an appellant normally has "the burden of showing that any technical errors that he may complain of have affected his substantial rights," when the error "is of such character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will * * * rest upon the one who claims under it." *Id.* at 760 (quoting H.R. Rep. No. 913, 65th Cong., 3d Sess. 1 (1919)).

In *O'Neal*, this Court held that in a habeas corpus proceeding, when a court is in "grave doubt" about the likely effect of a constitutional error on the jury's guilty verdict, it should conclude that the error was not harmless. 513 U.S. at 435-436. In so holding, the Court rejected the argument that the appellant's burden of showing prejudice in a civil action applies to habeas proceedings. *Id.* at 440. The Court acknowledged the statement in *Palmer*, 318 U.S. at 116, that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted," but it explained that that language referred to technical errors and thus did not encompass errors that have the "natural effect" of prejudicing substantial rights. *O'Neal*, 513 U.S. at 439-440.

Kotteakos and *O'Neal* are inapplicable here because they involved an individual's loss of liberty, not an administrative adjudication of an entitlement to monetary benefits. The nature of the proceeding in *Kotteakos*—a criminal prosecution—was crucial to the Court's decision in that case. As the Court explained, although Section 391 was applicable to both civil and criminal cases, the statute "grew out of widespread and deep conviction over the general course of appellate review in American criminal causes." 328 U.S. at 759. And the Court observed that the statute "did not make irrelevant the fact that a person is on trial for his life or his liberty. It did not require the same judgment in such a case as in one involving only some question of civil liability." *Id.* at 763. In fact, just six months after *Kotteakos*, this Court described its decision in that case as involving a review of "the history of [Section 391] and the function it was designed to serve in *criminal* cases." *Fiswick* v. *United States*, 329 U.S. 211, 217-218 (1946) (emphasis added).

Likewise, the Court in *O'Neal* emphasized "the stakes involved" in the proceeding. 513 U.S. at 440. Specifically, it observed that "the errors being considered by a habeas court occurred in a *criminal* proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake." *Ibid.* In addition, the Court noted, the error involved was "of constitutional dimension"—another consideration that is not present here. *Id.* at 442.

b. The court of appeals attempted to justify its reliance on *Kotteakos* and *O'Neal* by quoting *O'Neal*'s statement that "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." App., *infra*, 15a (quoting

O'Neal, 513 U.S. at 441). But the Court in *O'Neal* made that observation in the context of 28 U.S.C. 2111 and former Section 391, which, "by its terms, applied to both civil and criminal cases." 513 U.S. at 441. The Court also noted that "the current harmless-error sections of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (which use nearly identical language) both refer to § 391 as their statutory source." *Ibid.*

Those provisions are inapplicable in administrative review proceedings like those at issue here. Rather, these cases involve a different statute that uses different language. Compare 38 U.S.C. 7261(b)(2) (Supp. V 2005) (The Veterans Court shall "take due account of the rule of prejudicial error."), with 28 U.S.C. 2111 ("[T]he court shall give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties."). And unlike 28 U.S.C. 2111, the statute at issue here has no application to criminal proceedings.

Moreover, *O'Neal* considered the appropriate resolution of civil appeals only in cases where there was "grave doubt as to the harmlessness of errors." 513 U.S. at 441. It did not address the situation presented here, in which a party challenging a decision has identified no evidence at all that the outcome would have been different but for the alleged error. In that context, even after *O'Neal*, courts of appeals have held that in "ordinary civil cases," when a reviewing court is "unable, for whatever reasons, to determine whether an error was prejudicial or harmless," then the appellant cannot prevail. *Morrison Knudsen Corp.* v. *Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1239 (10th Cir. 1999); see *Burkhart* v. *WMATA*, 112 F.3d 1207, 1214-1215 (D.C. Cir. 1997); *Phoenix Eng'g & Supply Inc.* v. *Universal Elec. Co.*, 104 F.3d

1137, 1142 (9th Cir. 1997); see also *In re Watts*, 354 F.3d 1362, 1369 (Fed. Cir. 2004).

c. In relying on *Kotteakos* and *O'Neal*, the court of appeals also overlooked the procedural differences between judicial review of agency action and appellate review of a lower court's decision. Cf. *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940) ("[T]o assimilate the relation of * * * administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process."). In *O'Neal*, the Court explained that the concept of burdens of proof was not helpful in the context of that case because the matter at issue "involve[d] a judge who applies a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect." 513 U.S. at 436. The same cannot be said of a veterans-benefits case in which the question is whether the VA's notice error precluded a claimant from presenting evidence or argument in support of a claim for veterans benefits or from requesting that the VA obtain the requisite evidence or information.

In these cases, for example, Sanders allegedly failed to receive notice of "who would ultimately be responsible for obtaining evidence necessary to substantiate [his] claim" App., *infra*, 38a, while Simmons allegedly failed to receive notice "of the evidentiary prerequisites for establishing" her claim, *id.* at 78a. Those errors might have prejudiced respondents by making it more difficult for them to provide appropriate evidentiary support for their claims. The only way to determine whether there was prejudice, however, is to conduct an inquiry into whether, in the absence of the notice error, respondents

would have been able to submit additional evidence. The record before the Veterans Court includes the VA's entire file, and respondents are in a far better position than the VA to know what additional evidence they might have submitted. The decisions of the court of appeals are thus inconsistent with the general principle that burdens are appropriately placed on the party who is more likely to have knowledge of the relevant facts. See *United States* v. *Fior d'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002).

Further, in contrast to *Kotteakos*, in which the court of appeals provided the first opportunity to correct a trial-court error, the non-adversarial proceedings before VA regional offices and the Board offer many opportunities to correct any errors that might occur in the initial notice provided under Section 5103(a). See *Thurber* v. *Brown*, 5 Vet. App. 119, 123 (1993) ("VA's nonadversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process."); see also 38 U.S.C. 5104, 7105(d). For example, should the VA fail to provide sufficient notice under Section 5103(a), its general duty to provide assistance under 38 U.S.C. 5103A—including by helping to develop the record for review—might well lead it to correct the deficient initial notice, since the claimant's involvement in the VA's development efforts would provide opportunities to submit any information or evidence necessary to substantiate a claim.

In fact, opportunities to correct an initial notice error continue beyond the initial decision by the VA regional office in a case. Not only must that initial decision contain a written statement of the reasons and bases for the decision, which informs the claimant of the evidence or

information that may have led to the denial of benefits, but should the claimant disagree with the decision, the regional office may take additional development or review action. See 38 U.S.C. 5104(b). That action may include consideration of any additional evidence provided by the claimant before transmitting the record to the Board for a review upon appeal. See 38 U.S.C. 7105(d)(1); 38 C.F.R. 19.26, 19.29, 19.37. Even after the appeal is transferred to the Board, the claimant may introduce additional evidence, either documentary or testimonial. See 38 U.S.C. 7105(a); 38 C.F.R. 19.9, 20.1304(c). Those procedures reduce the potential for prejudice resulting from any isolated notice error, and they make a presumption of prejudice all the more unwarranted. The decisions below ignored those features of the VA claims system.

C. The Question Presented Is Important And Warrants This Court's Review

The decisions of the court of appeals will have a significant adverse effect on the VA adjudication process. The VA receives more than 800,000 benefits claims per year, and it must provide notice under Section 5103(a) with respect to all claims except those based on clear and unmistakable error. See *Livesay* v. *Principi*, 15 Vet. App. 165, 179 (2001) (en banc); 38 U.S.C. 5109A, 7111. It is often difficult to determine precisely what notice is required under the VCAA in any given case, because the required notice varies depending on the specific claim asserted by the veteran. See *Wilson* v. *Mansfield*, 506 F.3d 1055, 1062 (Fed. Cir. 2007) (notice "necessarily must be tailored to the specific nature of the veteran's claim"); see also *Vazquez-Flores* v. *Peake*, No. 05-0355, 2008 WL 239951, at *3 (Vet. App. Jan. 30,

2008). As a result, there will be many cases in which claimants can plausibly assert that a VCAA-notice error occurred. And in a significant fraction of those cases, the allocation of the burden of showing prejudice will be outcome-determinative.

Under the decisions of the court of appeals, the VA can prevail only by demonstrating that the claimant was not prejudiced. It is likely that the VA will be unable to meet that burden of proof in many cases—even those in which there was not, in fact, any prejudice as a result of the VCAA error. For example, the court of appeals held that the VA could overcome the presumption of prejudice by showing that "any defect was cured by actual knowledge on the part of the claimant." App., *infra*, 14a-15a. But while the claimant is presumably aware of whether he or she had actual knowledge—and could easily deny having actual knowledge if such a denial is warranted—the VA is unlikely to have any evidence bearing on the question. Similarly, it might be true that "a benefit could not possibly have been awarded" in a particular case, *id.* at 63a, because there is no evidence supporting the claim. That fact would be known to the claimant, but the VA will likely be unable to demonstrate it. See *Elkins* v. *United States*, 364 U.S. 206, 218 (1960) ("As a practical matter it is never easy to prove a negative.").

The result of the decisions below will therefore be a large number of remands, in each of which the VA will be required to provide an additional notice to the appellant, await a response from the appellant, and then readjudicate the remanded claim. To make matters worse, the VA has a statutory obligation to provide expedited treatment to remanded claims. See 38 U.S.C. 5109B, 7112 (Supp. V 2005). Many of those remands will

be pointless because, for reasons known to the claimant but not the VA, the notice error will have made no difference to the outcome of the proceeding. Those remands will divert resources from the adjudication of meritorious claims, placing further strain on the VA's already burdened claims-administration process and delaying awards of benefits to deserving veterans. Those results are not justified by the language of Section 7261(b)(2) or the VCAA, and warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 06-7001

WOODROW F. SANDERS, CLAIMANT-APPELLANT

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, RESPONDENT-APPELLEE

May 16, 2007

Before NEWMAN, MAYER, and PROST, Circuit Judges.

PROST, Circuit Judge.

Woodrow F. Sanders appeals an August 25, 2005, decision by the United States Court of Appeals for Veterans Claims ("Veterans Court") that affirmed a decision by the Board of Veterans' Appeals ("Board") denying Mr. Sanders's claim for service connection for choroidoretinitis of his right eye. *Sanders v. Nicholson,* 20 Vet. App. 143 (2005). Because the Veterans Court incorrectly required Mr. Sanders to establish that an error in a notice the Department of Veterans Affairs ("VA") is required to give claimants was prejudicial, we reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND

Mr. Sanders served in the United States Army from May 1942 to September 1945. Although his service medical records do not indicate that he suffered an eye trauma or abnormality and no eye abnormalities were recorded in his separation medical examination, Mr. Sanders asserts that on September 12, 1944, while serving in France, a bazooka exploded near him, burning the right side of his face. In December 1948, Mr. Sanders was diagnosed with chronic, right-eye choroidoretinitis, an inflammation of the choroids and retina. Believing his choroidoretinitis was caused by his injury in 1944, Mr. Sanders submitted a claim for service connection for a right-eye disability to the VA. The VA regional office ("VARO") denied his claim in February 1949.

Approximately forty years later, Mr. Sanders filed a statement attempting to reopen his claim for service connection for his choroidoretinitis. In support of his claim, Mr. Sanders submitted a statement from a VA ophthalmologist, dated December 1992, and a statement from a private ophthalmologist, dated September 1993. The VA ophthalmologist reported that Mr. Sanders stated that he was injured in a bridge explosion, rather than a bazooka explosion, and that he had experienced vision loss in his right eye ever since. The VA ophthalmologist went on to diagnose right and left macular chorioretinal scars and stated that "[i]t is not inconceivable that these macular and retinal lesions in each [eye] and particularly the right could have occurred secondary to trauma."

Mr. Sanders's private ophthalmologist also reported that Mr. Sanders indicated that his injury occurred during a bridge explosion and that he had experienced

vision loss in his right eye since then. The ophthalmologist diagnosed large chorioretinal scars in both eyes and opined that "[t]his type of macular injury in his right eye can certainly be concussive in character and his history supports the visual acuity loss from his injury in World War II."

Mr. Sanders later stated that both the VA ophthalmologist and his private ophthalmologist were incorrect in reporting that his eye injury occurred during a bridge explosion. Instead, Mr. Sanders reiterated that his injury occurred when the right side of his face was burned by a bazooka explosion. According to Mr. Sanders, this injury went unreported because there were no medics to whom he could report his injury and because most of his fellow soldiers were wounded or killed. Nonetheless, in July 1994 the VARO found Mr. Sanders had failed to present new and material evidence to reopen his claim. Mr. Sanders appealed to the Board, but the Board denied his claim for service connection in a decision dated November 27, 1998. In January 1999, however, the Veterans Court remanded Mr. Sanders's case for further development and adjudication.

In June 2000, the Board found that new and material evidence had been presented to reopen Mr. Sanders's claim for service connection and remanded Mr. Sanders's claim for a VA ophthalmologic examination to determine the etiology of his right-eye condition.

In December 2000, Mr. Sanders had a comprehensive eye examination by a VA optometrist. The optometrist diagnosed decreased vision in the right eye due to a macular scar and a small chorioretinal scar in the left eye, but stated that, based on the fact that Mr. Sanders's visual acuity in the right eye was 20/20 on May 15,

1942, and 20/25 on September 25, 1945, when he was discharged from the Army, it is unlikely that the decrease in vision was related to Mr. Sanders's September 1944 trauma. The optometrist also noted that there was no documented evidence of reduced vision until 1948. According to the optometrist, "[i]t is certainly possible for there to have been damage to the retina in 1944 that then hemorrhaged in 1948, . . . but there are no other signs of ocular trauma." The optometrist concluded that "[t]he chorioretinitis is most likely infectious in nature, although the etiology at this point is impossible to determine." Although he noted it was possible Mr. Sanders contracted some infection during his military service, the optometrist stated that "there is no way to prove this either."

In August 2001, Mr. Sanders was also examined by another VA ophthalmologist, who diagnosed dense macular scarring of the right eye and early macular degeneration of the left eye. The ophthalmologist stated that Mr. Sanders's decreased vision was consistent with these clinical findings, but that the etiology of Mr. Sanders's macular scar "is more difficult to ascertain." According to the ophthalmologist, "[i]f [Mr. Sanders's] vision had been normal in the right eye prior to the reported injury, then it is possible that the macular scar could be related to the injury." The ophthalmologist further stated that "[d]ue to the fact that [Mr. Sanders] does have the additional punched out chorioretinal scars in both eyes, the possibility of [an infection] as the etiology of the macular scar could also be entertained."

The VARO issued Supplemental Statements of the Case in 2001 and 2002 discussing this additional medical evidence. The VARO also sent Mr. Sanders a letter

stating that it had all the information it needed to decide his claim, but that he could submit any additional evidence he wanted considered.

In October 2003, the Board denied Mr. Sanders's claim for service connection for his right-eye choroidoretinitis. The Board found that the opinion of the VA optometrist was more probative on the issue of whether Mr. Sanders's choroidoretinitis was service-related and concluded that the preponderance of the evidence weighed against the claim. Mr. Sanders appealed to the Veterans Court.

On appeal to the Veterans Court, Mr. Sanders argued that the VA failed to provide notice as to who was responsible for obtaining the evidence necessary to substantiate his claim, as required by the notice provision of the Veterans Claims Assistance Act of 2000 ("VCAA"), 38 U.S.C. § 5103(a), and failed to provide this notice prior to the initial denial of his claim.

In a decision dated August 25, 2005, the Veterans Court found that there was a plausible basis in the record for the Board's decision denying service connection. The Veterans Court also found that Mr. Sanders did not allege any specific prejudice resulting from the VA's alleged failure to notify him about who would ultimately be responsible for obtaining the evidence necessary to substantiate his claim, and to provide notice before the initial unfavorable decision by the VARO. Because Mr. Sanders did not meet the burden of showing how such errors affected the fairness of the adjudication, the Veterans Court stated that it need not consider whether any error occurred. Mr. Sanders appeals to this court. We have jurisdiction over appeals from the Veterans Court pursuant to 38 U.S.C. § 7292.

II. DISCUSSION

A. Standard of Review

In reviewing a Veterans Court decision, this court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(d)(1). We must set aside any regulation or interpretation thereof, "other than a determination as to a factual matter," relied upon by the Veterans Court that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." *Id*. We review questions of statutory interpretation de novo. *Summers v. Gober*, 225 F.3d 1293, 1295 (Fed. Cir. 2000). Except to the extent that an appeal presents a constitutional issue, this court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

B. History of the VCAA

At the center of Mr. Sanders's appeal are the notice requirements of the VCAA. The VCAA was enacted in November 2000 to ensure that the VA assisted veterans claiming VA benefits. The legislation was passed in response to concerns expressed by veterans, veterans service organizations, and Congress over a July 1999 decision of the Veterans Court, *Morton v. West*, 12 Vet. App. 477 (1999), which held that the VA did not have a duty to assist veterans in developing their claims unless the claims were "well-grounded." Put another way, prior to the VCAA, the VA only had to assist in the full de-

velopment of a veteran's claim if the veteran first provided enough information for the VA to determine that the claim was plausible. The VCAA eliminated this well-grounded-claim requirement. *See* 146 Cong. Rec. H9913-14 (Oct. 17, 2000) (Explanatory Statement by the House and Senate Committees on Veterans' Affairs). Instead, Congress noted that under the VA's "claimant friendly" and "non-adversarial" adjudicative system, the VA "must provide a substantial amount of assistance to a [claimant] seeking benefits." 146 Cong. Rec. at H9913 (citations omitted).

Under the legal framework of the VCAA, there is generally no prerequisite to receiving VA assistance; the VA is simply required to assist a claimant at the time that claimant files a claim for benefits. *See* 38 U.S.C. § 5103A(a); 38 C.F.R. § 3.159(c) (2003). As part of this assistance, the VA is required to notify claimants of what they must do to substantiate their claims. 38 U.S.C. § 5103(a). If the VA denies a claim, it must provide the claimant with a statement of the reasons for the decision and a summary of the evidence considered. 38 U.S.C. § 5104(b). If a claimant files a notice of disagreement, the VA must issue a statement of the case summarizing the reasons for the VA's decision on each issue, the evidence considered, and the relevant statutes and regulations. 38 U.S.C. § 7105(d)(1). All claimants are entitled to appear at their hearings for the purpose of presenting evidence, and VA personnel conducting hearings are instructed to "suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position." 38 C.F.R. § 3.103(c)(2).

As mentioned above, Mr. Sanders's appeal focuses on the notice requirements of the VCAA. These notice requirements are contained within 38 U.S.C. § 5103(a), which states:

> Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

38 U.S.C. § 5103(a).

The purpose of § 5103(a) notification "is to ensure that the claimant's case is presented to the initial decisionmaker with whatever support is available, and to ensure that the claimant understands what evidence will be obtained by the VA and what evidence must be provided by the claimant" prior to the initial adjudication of his claim. *Mayfield v. Nicholson*, 444 F.3d 1328, 1333-34 (Fed. Cir. 2006) ("*Mayfield II*"). Moreover, the VA's duty to notify cannot be satisfied "by various post-decisional communications from which a claimant might have been able to infer what evidence the VA found lacking in the claimant's presentation," as such post-decisional notices do not contain the same content or serve the same purpose as § 5103(a) notification. *Id.*; *see also Pelegrini v. Principi*, 18 Vet. App. 112, 120 (2004).

The statutory notice requirement of § 5103(a) is implemented in 38 C.F.R. § 3.159(b)(1), which provides, in pertinent part:

> When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim.

Accordingly, the notice required by the VCAA can be divided into four separate elements: (1) notice of what information or evidence 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. Errors with regard to these elements are referred to as first-element, second-element, third-element, and fourth-element notice errors, respectively.

This court has previously held that such VCAA notice errors are reviewed under a prejudicial error rule. *Conway v. Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004). This is consistent with 38 U.S.C. § 7261(b)(2), which states that the Veterans Court shall "take due account of the rule of prejudicial error" when reviewing the re-

cord of proceedings before the Secretary and the Board of Veterans' Appeals. The court in *Conway,* however, did not express an opinion as to what it means for the Veterans Court to "take due account" of the rule, nor did it define what constitutes prejudicial error. *Conway,* 353 F.3d at 1375.

Lacking specific guidance from this court, the Veterans Court took it upon itself to address how to apply the rule of prejudicial error in *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005) ("*Mayfield I*"), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006). As an initial matter, the Veterans Court in *Mayfield I* held that an appellant asserting a VCAA notice error bears the burden of convincing the court that a notice error has, indeed, been committed, by referring to specific deficiencies in the documents in the record on appeal, including any documents that may have been relied on as satisfying the notice requirements of § 5103(a). *Id*. at 111.

Next, the court addressed what was meant by prejudicial error. *Id*. at 112-16. After analyzing Supreme Court and Federal Circuit precedent, as well as interpretations of the prejudicial error rule under the Administrative Procedure Act ("APA"),[1] the court concluded that "an error is prejudicial if it affects the 'substantial rights' of the parties in terms of 'the essential fairness of the [adjudication].' " *Id*. at 115 (quoting *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 553-54, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)). As stated by the court, this did not require an outcome to have been dif-

[1] Similar to the VCAA, the APA requires federal courts to take "due account . . . of the rule of prejudicial error" when reviewing agency administrative action. 5 U.S.C. § 706.

ferent to have been prejudicial. *Id.*; *see also Kotteakos v. United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error had substantial influence."). That said, a demonstration that the outcome would not have been different in the absence of the error would demonstrate that there was no prejudice. *Mayfield I*, 19 Vet. App. at 115.

According to *Mayfield I,* Congress, in § 7261(b)(2), provided the Veterans Court "with considerable discretion in determining what burdens should be carried by the parties regarding [its] taking due account of the prejudicial-error rule." *Id.* at 117. After analyzing Supreme Court precedent in other contexts, *see id.* at 117-20, the court concluded that

> in the section 5103(a) notice context an appellant generally must identify, with considerable specificity, how the notice was defective and what evidence the appellant would have provided or requested the Secretary to obtain (e.g., a nexus medical opinion) had the Secretary fulfilled his notice obligations; further, an appellant must also assert, again with considerable specificity, how the lack of that notice and evidence affected the essential fairness of the adjudication.

Id. at 121. However, if the asserted error is found to exist and to be of the type that has the "natural effect" of producing prejudice, an appellant need not have pled prejudice. *Id.* Instead, "it is the Secretary's burden to demonstrate lack of prejudice in terms of the fairness of the adjudication." *Id.* To do this, the Secretary is re-

quired to persuade the court that the purpose of the notice was not frustrated—e.g., by demonstrating: (1) that any defect in notice was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice provided what was needed, or (3) that a benefit could not possibly have been awarded as a matter of law. *Id.* With this in mind, the Veterans Court defined the roles of the claimant and the Secretary in connection with the court's taking due care of the prejudicial error rule in the context of the various types of notice element and timing errors.

With respect to the first notice element, i.e., notice regarding the information and evidence necessary to substantiate the claim, the court held 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. *Id.* at 122. Accordingly, the court held that such a first-element error was presumed prejudicial, and that the VA had the burden of demonstrating that the appellant was not prejudiced by the notice error. *Id.*

With respect to the second and third notice elements, i.e., notice regarding which portion of the information and evidence necessary to substantiate the claim, if any, is to be provided by the claimant and which portion, if any, the Secretary will attempt to obtain on behalf of the claimant, the court noted that "the assertion of [such an] error, by itself, does not have the natural effect of producing prejudice because this asserted error did not preclude the appellant from effectively participating in

the processing of [the] claim." *Id*. Instead, "prejudice can arise from such an asserted error only if [the appellant] failed to submit evidence because [he or] she was not advised to do so, or if the Secretary failed to seek to obtain evidence that he should have obtained." *Id*. Accordingly, with respect to second and third notice elements, the Veterans Court placed the burden of establishing prejudice on the claimant, requiring the claimant to identify: (1) how the notice was defective; (2) what evidence the appellant would have provided or requested the Secretary to obtain had the Secretary fulfilled his notice obligations; and (3) how the lack of that evidence affected the essential fairness of the adjudication. *Id*. at 121.

With respect to the fourth notice element, i.e., that the notice "request that the claimant provide any evidence in the claimant's possession that pertains to the claim," 38 C.F.R. § 3.159(b)(1), the court also placed the burden of showing prejudice on the claimant. *Id*. at 122-23. According to the court, "[p]rejudice would exist only if the claimant had evidence in [his or] her possession, not previously submitted, that is, of the type that should be considered by the Secretary in assessing her claim." *Id*. at 122. Moreover, whether or not claimant had such evidence "is a matter within [his or] her knowledge and certainly outside the Secretary's." *Id*. at 123. Accordingly, the court thought the burden to prove prejudice was properly placed on the claimant, rather than on the Secretary. This required the claimant to identify: (1) how the notice was defective, (2) what evidence the appellant would have provided had the Secretary fulfilled his notice obligations, and (3) how the lack of that evidence affected the essential fairness of the adjudication. *Id*. at 121.

Finally, with regard to timing errors, the court noted that such errors "do[ ] not have the natural effect of producing prejudice and that, therefore, prejudice must be pled as to it." *Id.* at 123.

C. Prejudicial Error Rule in the VCAA Context

On appeal, Mr. Sanders contends that the Veterans Court's opinion in *Mayfield I,* requiring a claimant to show prejudice as the result of an untimely or inadequate VCAA notice with respect to second-, third-, and fourth-element notice errors, misinterprets 38 U.S.C. § 5103(a) and 38 U.S.C. § 7261(b)(2). Instead, Mr. Sanders argues that all VCAA notice violations should be presumed prejudicial, as is the case with first-element notice errors under *Mayfield I*.[2] We agree.

The requirement that a claimant demonstrate prejudice as a result of a VCAA notice error is at odds with the very purpose behind the passage of the VCAA. Instead, we hold that the VCAA notice errors should be presumed prejudicial, requiring reversal unless the VA can show that the error did not affect the essential fairness of the adjudication. To do this, the VA must persuade the reviewing court that the purpose of the notice was not frustrated, e.g., by demonstrating: (1) that any

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[2] Although Mr. Sanders's brief argues that VCAA notice errors should be deemed per se prejudicial, the brief also acknowledges an exception to this rule "when, under any conceivable factual scenario, further development of the record would not support an award of benefits." (Appellant's Br. 18 n.9.) As such, Mr. Sanders does not advocate a true "per se prejudicial" rule. Instead, at oral argument counsel for Mr. Sanders clarified his position as advocating a presumption of prejudice for all VCAA notice errors, similar to the presumption applied to first-element notice errors under *Mayfield I.*

defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law. In other words, we conclude that the rule the Veterans Court applied to first-element notice errors should also apply to second-, third- and forth-element notice errors.

Although the Supreme Court in *Palmer v. Hoffman*, 318 U.S. 109, 116, 63 S. Ct. 477, 87 L. Ed. 645 (1943) held that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted," the Supreme Court has also held that "the burden of showing that any technical errors . . . affected his substantial rights" does not always fall to the party seeking a new trial. *Kotteakos*, 328 U.S. at 760, 66 S. Ct. 1239. Instead, "[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." *Id*. The 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." *O'Neal v. McAninch*, 513 U.S. 432, 441, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995).

In *Mayfield I,* the Veterans Court acknowledged that "[s]ection 5103(a) assumes a fundamental role in furthering an interest that goes to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system . . . by affording a claimant a meaningful opportunity to participate effectively in the pro-

cessing of his or her claim." 19 Vet. App. at 120-21 (citations omitted); *see also id.* at 120 ("Nothing in the VCAA's legislative history, or in the VA's August 2001 regulations or their regulatory history, suggests that the VCAA and its implementing regulations were not intended to bestow upon an appellant a substantial right by way of amended section 5103(a) notice."). 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.

Moreover, despite its proffered justifications, the Veterans Court erred by parsing the various elements of the notice required by § 5103(a) and finding certain elements of the required notice more substantial than others. As stated by the Supreme Court, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339, 49 S. Ct. 336, 73 L. Ed. 722 (1929). The Veterans Court, however, took Congress's clear desire to create a framework conducive to efficient claim adjudication and instead created a system that practically requires a claimant asserting a notice error to seek counsel simply to be able to navigate the appeal process and assure him or herself of a fair adjudication. For example, 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 bear the burden of (1) figuring out what it means to "affect the essential fairness of the adjudication," and persuading the court in an adversarial judicial proceeding that the essential fairness of the underlying adjudication was indeed affected. Given Congress's intent to not only involve but assist the claimant in the processing of his or her claim, and given that the

rule of prejudicial error only arises when the VA has undisputedly failed to follow statutory requirements, the system created by *Mayfield I* cannot be consistent with what Congress envisioned when passing the VCAA.

Additionally, the Veterans Court compounded this error by discounting the importance of several of the various notice elements when considering whether the various VCAA notice errors had the natural effect of prejudicing the appellant. With respect to first-element notice errors, we agree with the Veterans Court 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. *Mayfield I*, 19 Vet. App. at 122. However, we fail to see how second-, third-, and fourth-element notice errors are so materially different from first-element notice errors as to compel substantially different treatment.

With respect to second- and third-element notice errors, the Veterans Court incorrectly concluded that such an error "did not preclude the appellant from effectively participating in the processing of [the] claim." *Id*. Instead, the Veterans Court stated that "prejudice can arise . . . only if [the appellant] failed to submit evidence because [he or] she was not advised to do so, or if the Secretary failed to seek to obtain evidence that he should have obtained." *Id*. This fact, however, does not dictate placing the burden of establishing prejudice on the claimant. In passing the VCAA, 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. If Congress felt that such notice elements were not necessary to allow the claimant to effectively participate in the processing of his or her claim, then why would it have required them as part of the notice pursuant to § 5103(a)? By presuming these notice errors were not prejudicial, the Veterans Court essentially excused the VA's failure to satisfy its statutory obligations—ones which Congress explicitly required in order to allow the claimant to effectively participate in the processing of his or her claim—without a showing that the defect had not frustrated the very purpose of the notice. This was error.

The Veterans Court also incorrectly placed the burden of establishing prejudice on the appellant with respect to fourth-element notice errors. Although the Veterans Court correctly stated that "[p]rejudice would exist only if the claimant had evidence in [his or] her possession, not previously submitted, that is, of the type that should be considered by the Secretary in assessing her claim," *id.*, this fact does not dictate placing the burden of establishing prejudice on the appellant. And although the Veterans Court did not base its allocation of the burden on that fact that whether or not the claimant had such evidence "is a matter within [his or] her knowledge and certainly outside the Secretary's," *id.* at 123, this fact only highlights the importance of providing proper notice to the claimant.

Finally, with regard to timing errors, the Veterans Court also incorrectly placed the burden of establishing prejudice on the appellant. As this court pointed out, the purpose of § 5103(a) notification is to ensure that the

claimant's case is presented with all available support prior to the initial adjudication of his claim. *Mayfield II*, 444 F.3d at 1333-34. Post-decisional notices cannot satisfy the VA's § 5103(a) notification duty. *Id*. By assuming timing errors are not prejudicial, however, the Veterans Court essentially held the opposite—that post-decisional notices can be assumed to have satisfied this duty. It is not for the Veterans Court, nor for this court for that matter, to disregard Congress's intended purpose. Accordingly, presuming such timing errors were not prejudicial was error on the part of the Veterans Court.

In light of the above discussion, we hold that any error in a VCAA notice should be presumed prejudicial. The VA has the burden of rebutting this presumption. That said, this opinion does not displace the rule that the claimant bears the burden of demonstrating error in the VCAA notice, *see* U.S. Vet. App. R. 28(a), nor does it change the rule that reversal requires the essential fairness of the adjudication to have been affected. This opinion merely clarifies that all VCAA notice errors are presumed prejudicial and that the VA has the burden of rebutting this presumption.

In announcing this rule, we are mindful of the Supreme Court's admonition that only certain "structural errors undermining the fairness of a criminal proceeding as a whole" warrant reversal without regard to the mistake's effect upon the proceeding, *United States v. Benitez,* 542 U.S. 74, 81, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004). A presumption of prejudice does not require reversal in all instances of VCAA notice error. Only in situations where the VA cannot rebut the presumption would reversal be warranted.

Moreover, the presumption of prejudice does not defeat the purpose of the rule of prejudicial error, i.e., "to avoid wasteful proceedings on remand where there is no reason to believe a different result would have been obtained had the error not occurred." *In re Watts,* 354 F.3d 1362, 1369 (Fed. Cir. 2004). Instead, it merely shifts the burden of rebutting this presumption to the VA in light of the uniquely pro-claimant benefit system created by the VCAA.

We are also mindful that when § 7261(b)(2) was originally enacted—as 38 U.S.C. § 4061(b)—the Senate Committee on Veterans Affairs issued a report that stated its scope-of-review provisions "would incorporate a reference to the 'rule of prejudicial error' as included in the [APA]," and that this would require a court to "pass over errors in the record of the administrative proceedings that the court finds not to be significant to the outcome of the matter." S. Rep. No. 100-481, at 62 (1988). However, the treatment of prejudicial error under the APA is not dispositive, as even the Veterans Court recognized. In *Mayfield I,* after considering the APA, the Veterans Court still noted that § 7261(b)(2) left it with "considerable latitude as to how to 'take due account'" of the rule of prejudicial error. 19 Vet. App. at 114. Had the Veterans Court felt constrained by the interpretation of the rule of prejudicial error under the APA, such an acknowledgment would have been unnecessary. Moreover, the statement that § 4061(b) would "incorporate a reference to the 'rule of prejudicial error' as included in the [APA]" was made a dozen years prior to the passage of the VCAA. Even if Congress had previously intended veterans' claims notice errors to be assessed under the same prejudicial error rule as APA notice errors, such intent was abrogated by the subsequent

passage of the VCAA, which, as previously discussed, substantially overhauled the administration of the VA benefits system. Like the Veterans Court, we, too, believe that Congress left the courts with "considerable latitude" in implementing the rule of prejudicial error. However, as discussed above, the Veterans Court overlooked the uniquely pro-claimant nature of the VA benefits system. Put simply, interpreting § 7261(b)(2) as requiring veterans to overcome a series of complex legal hurdles in order to secure the assistance mandated by Congress would clearly frustrate the purpose of the VCAA. As such, the Veterans Court's interpretation of § 7261(b)(2) is in error.

III. CONCLUSION

Because the Veterans Court incorrectly required Mr. Sanders to demonstrate prejudice in the VCAA notice error context, we reverse and remand for proceedings consistent with this opinion.

COSTS

No costs.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 06-7001

WOODROW F. SANDERS, CLAIMANT-APPELLANT

v.

GORDON H. MANSFIELD, ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT-APPELLEE

[Filed: Oct. 23, 2007]

NOTE: This order is nonprecedential.

ORDER

A petition for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the court and filed by the Appellant, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 30, 2007.

FOR THE COURT,

/s/ JAN HORBALY/[JB]
JAN HORBALY
Clerk

DATED: 10/23/2007

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 03-1846

WOODROW F. SANDERS, APPELLANT

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, APPELLEE

MEMORANDUM DECISION

[Aug. 25, 2005]

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

Before LANCE, *Judge*.

LANCE, *Judge:* The appellant, Woodrow F. Sanders, through counsel, appeals from an October 1, 2003, Board of Veterans' Appeals (Board or BVA) decision that denied service connection for choroidoretinitis of the right eye. Record (R.) at 1-12. Single-judge disposition is appropriate. *See Frankel v. Deminski,* 1 Vet. App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the decision of the Board will be affirmed.

I. FACTS

The appellant served on active duty in the U.S. Amy from May 1942 to September 1945. R. at 16. His enlistment examination recorded that his uncorrected visual acuity was 20/20 in the [*sic*] both eyes. R. at 20. His service medical records (SMRs) are silent for any report of eye trauma or notation of eye abnormality. R. at 19-69. His separation medical examination recorded that his uncorrected visual acuity was 20/25 in the right eye and 20/20 in the left eye. R. at 69. No abnormality of the eyes was recorded. *Id*.

A December 1948 hospital record recorded the appellant's complaint of right-eye swelling and blurred vision of six months' duration. R. at 71-79. He was diagnosed with chronic, right-eye choroidoretinitis, cause undetermined. R. at 73. "Chorioretinitis" is defined as an inflammation of the choroid and retina and is synonymous with choroidoretinitis. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 346-47 (28th ed. 1994). Also in December 1948, the appellant filed a claim for service connection for a right-eye disability. R. at 81-89. He reported that he had been hospitalized at "A & NGH, Hot Springs, Arkansas," and that his right-eye condition began in June 1948, six months prior to his hospitalization. R. at 83, 86. In February 1949, the Little Rock, Arkansas, VA Regional Office (RO) denied his service-connection claim. R. at 94-95.

In August 1991, the appellant filed a statement in support of claim and attempted to reopen his service-connection claim for choroidoretinitis. R. at 97-98. He reported that while he was in Germany, a bazooka exploded on the right side of his face. R. at 97. He stated

that the explosion burned his eyebrows and facial hair and that he never saw a medic. *Id*. With regard to the onset of his right-eye disability, the appellant asserted that six months after his discharge (which would have been early 1946) he started to lose sight in the right eye and sought treatment from and was admitted to a VA hospital in Hot Springs, Arkansas. *Id*. The record is devoid of any medical records within this time frame asserted by the appellant. In a July 1992 statement, the appellant reported that the injury to his right eye occurred on September 12, 1944. R. at 100-03.

The appellant also submitted a December 1992 statement from a VA physician, Dr. Joseph Ruda, chief, ophthalmology section, and a September 1993 statement from Dr. Gregory A. Strainer, a private ophthalmologist. R. at 105, 108. Dr. Ruda recorded the appellant's past history as "being involved in a traumatic episode during WWII, being on a bridge and having it explode from underneath him and . . . [appellant's] reported . . . loss of vision since that episode in the right [eye]." *Id*. Upon physical examination, Dr. Ruda recorded "[right macular chore-retinal scar of 2 disc diameters in size of long duration[;] and [l]eft chore-retinal scar above the supertemporal arcade, 2-3 disc diameters in size." *Id*. Visual acuity was recorded as "hand motion at 1 foot in the right eye and 20/40 in the left." *Id*. Dr. Ruda offered the following opinion: "It is not inconceivable that these macular and retinal lesions in each fundi and particularly the right could have occurred secondary to trauma, as stated above by [the appellant]." *Id*.

Dr. Strainer recorded that the appellant related a history of being "involved with the battle on Mousson Hill, and [that] during this battle [he] was on a bridge which blew up underneath him, he fell and injured his

right eye. He stated that following this fall he has never been able to see properly out of his right eye." R. at 108. Upon physical examination, Dr. Strainer recorded "a large chorioretinal scar involving the right macula, and a large chorioretinal scar inferiorly in the left eye." *Id.* Visual acuity was recorded as "'count fingers' at one foot in the right eye and 20/40 in the left eye." *Id.* Dr. Strainer offered the following opinion: "This type of macular injury in his right eye can certainly be concussive in character and his history supports the visual acuity loss from his injury in World War II." *Id.*

In October 1993, the appellant submitted correspondence stating that "the attached doctor's statements [Dr. Ruda's and Dr. Strainer's] are incorrect in regard to what actually took place. My eye injury did not occur from a bridge explosion. The injury took place as stated on the attached VA Statement in Support of Claim." R. at 113. In the attached statement in support of claim, he related that his injury occurred while he was in Loisy, France, when a bazooka exploded and the right side of his face was burned by the flash. R. at 114-15. He further noted that at that time there were no medics to whom he could report his injury and that most of his fellow soldiers were killed or wounded. *Id.*

In July 1994, the RO determined that new and material evidence had not been presented to reopen his service-connection claim for choroidoretinitis. R. at 117-19. In September 1994, the appellant filed a Notice of Disagreement (NOD) and in October 1994 the RO issued a Statement of the Case (SOC). R. at 121, 123-33. In November 1994, the appellant filed a timely Substantive Appeal. R. at 135. In his Substantive Appeal, he stated that a few months after his injury he was transferred

from the infantry to an ordnance company because he could not see well enough to shoot. *Id*. The appellant also submitted two letters he wrote to his mother in November 1944 and January 1945. R. at 137-40. Neither letter refers to an eye injury. *Id*. A December 1994 medical record recorded the appellant's history of trauma from a bazooka blast and noted an impression of retinal epithelium atrophy' secondary to old trauma. R. at 143.

The appellant testified at a personal hearing in January 1995. R. at 145-55. He clarified that the injury to his right eye occurred as a result of a bazooka blast, and not as a result of a bridge explosion. R. at 150-51. On November 27, 1998, the Board denied his service-connection claim. R. at 168-79. In August 1999, pursuant to the parties' joint motion, this Court remanded the matter for further development and adjudication. R. at 182. On June 7, 2000, the Board found that new and material evidence had been presented to reopen the appellant's service-connection claim for choroidoretinitis, and remanded the claim to the RO for a VA ophthalmologic examination in order to determine the etiology of the appellant's right-eye condition. R. at 184-96.

In December 2000, the appellant was afforded a VA comprehensive eye examination by Dr. Sheila F. Anderson, chief, optometry. R. at 202-09. The appellant reported a history of injuring his right eye when a bazooka gun exploded in his face. R. at 202. He reported that he was hospitalized for his injury and that he noticed decreased vision in the right eye three days after he was released from the hospital. *Id*. Dr. Anderson's report recorded her findings on examination as well as her review of the appellant's claims file (C-file). R. at 202-09.

Dr. Anderson's assessment included decreased vision right eye from macular scar, cause unknown and a small chorioretinal scar, left eye. R. at 207. Dr. Anderson offered the following opinion:

> Based on the fact [that] the visual acuity in the right eye was 20/20 on [May 14, 1942,] and 20/25 on [September 25, 1945,] (upon discharge), it is unlikely that the decrease in vision was related to the trauma. The patient reports that the trauma happened on [September 13, 1944] and that he noticed the vision was blurry shortly thereafter ([three] days after discharge for treatment of his facial burns). However, it was not until 1948 that there is documented evidence of reduced vision and the records show that the patient reported decreased vision only 6 months prior to that visit. It is certainly possible for there to have been damage to the retina in 1944 that then hemorrhaged in 1948, as hemorrhages were noticed at that visit, but there are no other signs of ocular trauma. The chorioretinitis is mostly likely infectious in nature, although the etiology at this point is impossible to determine. It is also possible that the patient contracted some infection while in the service that caused the chorioretinitis, but there is no way to prove this either. Based on the documented records, the patient did not lose vision while on active duty.

R. at 207-08. The RO issued a Supplemental SOC (SSOC) that continued the denial of service connection for choroidoretinitis of the right eye. R. at 213-15.

In August 2001, the appellant was afforded a VA ophthalmology examination by Dr. Duane Y. Nii. R. at 245-46. The appellant reported that his right eye was injured in 1944 from a bazooka blast, which resulted in

severe decreased vision in the right eye. R. at 245. Dr. Nii's report recorded his findings on examination. R. at 245-46. Dr. Nii's assessment included dense macular scar of the right eye with small punched-out scars and early macular degeneration of the left eye. R. at 246. Dr. Nii offered the following opinion:

> The patient's decreased vision in the right eye is consistent with his clinical findings. The etiology of the patient's macular scar is more difficult to ascertain. If the patient's vision had been normal in the right eye prior to the reported injury, then it is possible that the macular scar could be related to the injury as the patient states. Due to the fact that the patient does have the additional punched out chorioretinal scars in both eyes, the possibility of toxoplasmosis as the etiology of the macular scar could also be entertained.

R. at 246.

The Board issued the decision on appeal on October 1, 2003. R. at 1-12. In the October 2003 decision, the Board denied service connection for choroidoretinitis of the right eye. *Id*. In reaching that conclusion, the Board found the December 2000 opinion by Dr. Anderson more probative than the opinions rendered by Drs. Ruda, Strainer, and Nii on the issue of whether the appellant's choroidoretinitis was related to service. R. at 12. The Board found that the preponderance of the evidence was against the claim for service connection. *Id*.

In his brief, the appellant argues for reversal of the Board's decision on the ground that there is no plausible basis for the Board's determination that the evidence preponderated against a finding of service connection. Appellant's Brief (Br.) at 5-10. He maintains that the

reports by Dr. Ruda and Dr. Strainer set forth his entitlement to service connection, and that Dr. Anderson's report does not prove otherwise. Br. at 7. In the alternative, the appellant requests that the Board's decision be vacated and the matter remanded for further development and adjudication. Br. at 10-13. He maintains that VA failed to satisfy its duty to notify as required by the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096. In his brief, the Secretary argues that the Court should affirm the Board's decision because it is plausibly based on the record and VA satisfied its duty to notify. Secretary's Br. at 8-17.

II. ANALYSIS

A. Entitlement to Service Connection

Establishing service connection generally requires (1) medical evidence of a current disability; (2) medical evidence, or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury. *See Hickson v. West*, 12 Vet. App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *see also* 38 C.F.R. § 3.303(a) (2004). The Board's determination of service connection and its application of the benefit-of-the doubt rule are findings of fact that the Court reviews under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4); *see Mariano v. Principi*, 17 Vet. App. 305, 313-17 (2003); *Russo v. Brown*, 9 Vet. App. 46, 50 (1996); *Swann v. Brown*, 5 Vet. App. 229, 232 (1993). "A factual finding 'is clearly erroneous when although there is evidence to support it,

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet. App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *Id.; see also Mariano*, 17 Vet. App. at 313 (applying "clearly erroneous" standard to assess, as directed by 38 U.S.C. § 7261(b)(l), Board's application of 38 U.S.C. § 5107(b) "equipoise standard").

When rendering its decision, the Board must consider all relevant evidence of record and address in its decision all potentially applicable provisions of law and regulation. *See* 38 U.S.C. § 7104(a); *Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991). The Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the decision, as well as to facilitate informed review in this Court. *See* 38 U.S.C. § 7104(d)(l); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert*, 1 Vet. App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza, supra; Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994). Moreover, the benefit of the doubt rule requires the Secretary to consider all lay and medical evidence of record, and if "there is an approximate bal-

ance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b); *see also* 38 C.F.R. § 3.102 (2004). However, "if a fair preponderance of the evidence is against a veteran's claim, it will be denied and the 'benefit of the doubt' rule has no application." *Gilbert*, 1 Vet. App. at 56; *see also Mariano, supra; Roberson v. Principi*, 17 Vet. App. 135, 146 (2003).

In the instant case, the Board acknowledged that because the appellant alleges that his injury occurred during combat, under 38 U.S.C. § 1154(b) and *Cohen v. Brown*, 10 Vet. App. 128 (1997), the Board may presume that the appellant's right-eye injury occurred, despite the lack of official record. R. at 9. The Board noted that although 38 U.S.C. § 1154 eases the appellant's burden to demonstrates that a particular injury occurred in service, it does not provide a basis to link etiologically the condition in service to the current condition. *See [i]d.* (citing *Cohen*, 10 Vet. App. at 138).

The Board then concluded that the competent and probative evidence of record does not establish a relationship between the right-eye choroidoretinitis and the alleged injury presumed to have been sustained in service. R. at 10. In reaching that conclusion, the Board acknowledged that there were conflicting medical opinions as to the etiology of the appellant's choroidoretinitis of the right eye. R. at 11. The Board then provided a thorough and well-reasoned analysis as to why it found the December 2000 opinion more probative than the December 1992, September 1993, and August 2001 opinions. *See* R. at 10-12. A review of the record reveals that the Board did not err in making that finding. *See*

Fenderson v. West, 12 Vet. App. 119, 127 (1999) (Board must account for evidence it finds persuasive and give adequate reasoning for its determination). Although the appellant disagrees with the Board's evaluation of that evidence, "[ilt is the responsibility of the BVA, not this Court, to assess the credibility and weight to be given to evidence." *Owens v. Brown*, 7 Vet. App. 429, 433 (1995) (Board does not err when it favors opinion of one medical expert over that of another).

In addressing the opinions rendered by Drs. Ruda and Strainer, the Board noted that neither physician had access to the appellant's SMRs or other relevant evidence. R. at 11. In this regard, the Court notes that the appellant's separation physical examination recorded his uncorrected right-eye vision as 20/25 in September 1945, one year after his injury, and his December 1948 medical records recorded a history of right-eye swelling and blurred vision that began in June 1948. R. at 69, 82, 86. The Board also noted that both opinions were offered in speculative language, and therefore were not particularly probative without consideration of relevant medical evidence. *See Bloom* v. *West,* 12 Vet. App. 185, 187 (1999) (doctor's use of word "could" without supporting clinical data or other rationale rendered doctor's opinion too speculative to provide the degree of certainty required for medical nexus evidence). In addition to the speculative nature of the opinions rendered by Drs. Ruda and Strainer, the Board noted that both opinions were based on the appellant's reported history of a bridge exploding resulting in a concussive trauma. However, the appellant later maintained that the history of a bridge exploding relied upon in each of these opinions was incorrect and that his injury was in the nature of a burn. *See Reonal*

v. Brown, 5 Vet. App. 458, 460-61 (1993) (opinion based upon an inaccurate factual premise has no probative value). In light of the fact that both opinions were based on the appellant's recitation of an injury that occurred 48 years earlier, were phrased as "possibilities" without the benefit of review of other relevant medical evidence, and were based on a description of how the injury was sustained that the appellant has admitted is inaccurate, the Court is satisfied that the Board provided an adequate statement of reasons or bases for why it did not find either opinion probative on the question whether the appellant's in-service injury caused his choroidoretinitis.

The Board next considered the report of the August 2001 VA ophthalmology examination in which Dr. Nii opined that the etiology of the right-eye disorder could be related to the injury described by the appellant. R. at 11, 246. However, the Board found that this report also lacked significant probative value because it did not indicate that the examiner had access to or reviewed pertinent medical evidence and because his etiology opinion was also speculative. *Id*. In that regard, the Board noted that although Dr. Nii related that the appellant's right-eye disorder could be related to the injury as stated by the appellant, Dr. Nii also opined that the possibility of toxoplasmosis as the etiology of the macular scar could also be entertained. *Id*.

Finally, the Board considered the December 2000 VA opinion rendered by Dr. Anderson. R. at 12, 202-08. Although the appellant notes that the Board incorrectly referred to the examiner as an ophthalmologist, rather than an optometrist, there is no indication in the record, nor has the appellant demonstrated that Dr. Anderson

was not competent to render an etiology opinion. Br. at 9. The Board found Dr. Anderson's opinion to be more probative on the issue of whether the appellant's right-eye condition was related to service. R. at 12. In reaching that conclusion, the Board noted that Dr. Anderson affirmatively opined that the appellant did not lose his right-eye vision during service or as a result of the alleged in-service trauma. *Id.* Dr. Anderson's report reveals that she rendered her opinion based upon a review of the appellant's C-file, including the appellant's visual acuity loss reported at enlistment and at discharge, relevant medical evidence and her physical findings on examination. R. at 207. She determined that "it is unlikely that the decrease in vision was related to the trauma." *Id.* The Board found her opinion "supported by explanation with reference to visual acuity at entrance and separation as shown in [SMRs], as well as initial findings of visual loss documented in records of the December 1948 post-service hospitalization." *Id.* She further opined that the choroidoretinitis is "most likely infectious in nature, although the etiology at this point is impossible to determine." R. at 208. In that regard, Dr. Anderson stated that it is "possible that the [appellant] contracted some infection while in the service that caused the chorioretinitis, but there is no way to prove this either." *Id.* Contrary to the appellant's assertions, Dr. Anderson's opinion does not establish a claim for service connection on the theory of infection. Although Dr. Anderson opined that the cause of the choroidoretinitis was "most likely" infectious in nature, she could not state without speculating whether the infection was contracted in service. *See Bloom, supra.*

Accordingly, the Court holds that there is a plausible basis in the record for the Board's decision and that the Board's decision is not clearly erroneous. *See* 38 U.S.C. § 7261(a)(4), (b)(l); *Mariano* and *Gilbert*, *supra.* Moreover, the Board provided an adequate statement of reasons or bases that sufficiently explains why, in the view of the Board, the December 2000 opinion of Dr. Anderson outweighs the opinions of Drs. Ruda, Strainer, and Nii. R. at 11-12; *see* 38 U.S.C. § 7104(a), (d)(1).

B. VCAA

The appellant argues that the Secretary did not fulfill his duty to notify him under 38 U.S.C. § 5103(a). Appellant's Br. at 4-7. The Secretary is required to inform the claimant of the information and evidence not of record (1) that is necessary to substantiate the claim, (2) that the Secretary will seek to obtain, if any, and (3) that the claimant is expected to provide, if any. *See* 38 U.S.C. § 5103(a); *Mayfield v. Nicholson*, 19 Vet. App. 103, 110 (2005) (citing *Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002)); 38 C.F.R. § 3.159(b) (2004). The Secretary is also required to "request that the claimant provide any evidence in the claimant's possession that pertains to the claim." *Mayfield, supra* (quoting 38 C.F.R. § 3.159(b)(1)); *see also Pelegrini v. Principi*, 18 Vet. App. 112, 121 (2004). The notice required under statutory section 5103(a) and regulatory § 3.159(b) must be provided upon receipt of a complete or substantially complete application for benefits and prior to an initial unfavorable decision on a claim by an agency of original jurisdiction such that the claimant has a "meaningful opportunity to participate effectively in the processing

of his or her claim." *Mayfield*, 19 Vet. App. at 120-21. The Secretary's failure to inform the appellant what evidence is necessary to substantiate his claim is presumptively prejudicial. *Mayfield*, 19 Vet. App. at 122. Any other statutory section 5103(a) or regulatory § 3.159(b) notice error, including an error in the timing of the notice, is not remandable error unless the appellant "identif[ies], with considerable specificity, how the notice was defective and what evidence the appellant would have provided or requested the Secretary to obtain . . . had the Secretary fulfilled his notice obligations; further, an appellant must also assert, again with considerable specificity, how the lack of that notice and evidence affected the essential fairness of the adjudication." *Id*. at 121.

In this case, the appellant contends that VA failed to provide notice of who would ultimately be responsible for obtaining evidence necessary to substantiate the claim and that VA failed to provide proper notice before the initial unfavorable decision by the agency of original jurisdiction. Br. at 10-12. However, the appellant has not alleged any specific prejudice caused by the asserted notice and timing errors. *Id.* Thus, insofar as the appellant has failed to plead with any specificity how the alleged notice and timing errors affected the essential fairness of the adjudication, the Court holds that the appellant has failed to meet his burden of going forward and, therefore, need not consider whether any error occurred. *See Mayfield*, 19 Vet. App. at 121.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record on appeal, and the parties' briefs, the Board's October 1, 2003, decision is AFFIRMED.

DATED: [AUG 25 2005]

APPENDIX D

BOARD OF VETERANS' APPEALS
DEPARTMENT AFFAIRS OF VETERANS
WASHINGTON, DC 20420

Docket No. 95-41 119
C 13 575 481

IN THE APPEAL OF WOODROW F. SANDERS

Date: [Oct. 1, 2003]

On appeal from the
Department of Veterans Affairs Regional Office in
Los Angeles, California

THE ISSUE

Entitlement to service connection for choroidoretinitis of the right eye.

REPRESENTATION

Appellant represented by: Mark R. Lippman, Attorney

WITNESS AT HEARING ON APPEAL

Veteran

ATTORNEY FOR THE BOARD

Michelle L. Nelsen, Counsel

INTRODUCTION

The veteran had active service from May 1942 to September 1945.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a July 1994 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Los Angeles, California.

The July 1994 rating decision found no new and material evidence to reopen the claim for service connection originally denied in February 1949. In subsequent rating actions, the RO reopened the claim but denied the claim on the merits. In a November 1998 decision on appeal, the Board denied service connection for choroidoretinitis of the right eye. The veteran appealed that deci-sion to the U.S. Court of Appeals for Veteran's Claims (Court). In an August 1999 Order, the Court vacated the Board decision and remanded the matter for readjudication, to include consideration of whether there was new and material evidence to reopen. In a June 2000 decision, the Board found new and material evidence to reopen the claim but determined that additional evidence was needed before adjudicating the appeal on the merits. It remanded the case to the RO to accomplish such development. On remand, the RO has continued to deny service connection for choroidoretinitis of the right eye. The case returns to the Board for final appellate review.

The Board notes that correspondence from the veteran received in April 2001 included a request for a Travel Board hearing. However, the veteran withdrew that request in August 2003.

FINDINGS OF FACT

1. The RO has provided all required notice and obtained all relevant evidence necessary for the equitable disposition of the veteran's appeal.

2. There is no evidence of right eye disorder in service or for several years thereafter.

3. The competent and probative evidence of record does not establish a nexus between the veteran's current right eye disorder and his period of active service or injury incurred or presumed to have been incurred therein.

CONCLUSION OF LAW

Service connection for choroidoretinitis of the right eye is not established. 38 U.S.C.A. §§ 1110, 1154, 5107 (West 2002); 38 C.F.R. §§ 3.303, 3.304 (2003).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Board observes that the Veterans Claims Assistance Act of 2000 (VCAA), 38 U.S.C.A. § 5100 *et seq.* (West 2002), eliminated the requirement for a well-grounded claim, enhanced VA's duty to assist a claimant in developing facts pertinent to his claim, and expanded VA's duty to notify the claimant and his representative, if any, concerning certain aspects of claim development. VA promulgated regulations that implement these statutory changes. *See* 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2002).

Review of the claims folder reveals compliance with the VCAA. Specifically, in a June 2003 letter, the RO set forth the requirements for establishing service connection for his disorder. It also explained the notice and assistance provisions of the VCAA, including VA's duty to obtain records such as service medical records and records held by other federal agencies and the veteran's responsibility to provide other evidence, such as medical records, or to provide VA with enough information to attempt to obtain such evidence on his behalf. The RO also listed the evidence already of record for the appeal and asked the veteran and his representative to identify any other evidence that would aid in adjudicating the appeal. The Board is satisfied that the notice requirements of the VCAA have been met. *See Quartuccio v. Principi*, 16 Vet. App. 183 (2002).

With respect to the duty to assist, the RO has secured service medical records, VA treatment records, private medical evidence as authorized by the veteran, and relevant medical examinations and opinions. *See Charles v. Principi*, 16 Vet. App. 370 (2002). The veteran has also submitted several lay statements and additional private medical evidence. There is no indication from the claims folder or allegation from the veteran or his representative that additional pertinent evidence remains outstanding. Accordingly, the Board finds that the duty to assist the veteran has been satisfied. 38 U.S.C.A. § 5103A.

Finally, the veteran has had ample opportunity to present evidence and argument in support of his appeal. As the RO has provided all required notice and

assistance, the Board may proceed to adjudicate the appeal without any prejudice to the veteran. *Bernard v. Brown*, 4 Vet. App. 384, 392-94 (1993).

The Board is also satisfied as to compliance with its instructions from the June 2000 remand. *See Stegall v. West*, 11 Vet. App. 268 (1998).

Factual Background

Service medical records were negative for any report of eye trauma or notation of eye abnormality. The report of the September 1945 physical examination at separation showed no abnormality of the eyes. Uncorrected visual acuity was 20/25 in the right eye and 20/20 in the left eye. His Army Separation Qualification Record showed principal duties in service of basic engineer, light truck driver, general carpenter, and demolition specialist.

The veteran's original claim, received in December 1948, indicated that the right eye disorder began in June 1948. He did not report any treatment related to the right eye in service.

Records from the Army and Navy General Hospital showed that the veteran was hospitalized in December 1948. It was noted that, six months before, the veteran's right eye became swollen and vision began to blur. Two weeks before, he underwent a physical and was refused employment. He came to the hospital for examination and treatment. Examination at admission revealed severe macular chorio-retinitis of the right eye, cause undetermined, with definite area of blindness in the central visual field. The final diagnosis was chronic right chor-

oidoretinitis, cause undetermined, 20/20 vision in the left eye and form vision in the right eye.

A January 1949 statement from J.M.F. related that he had known the veteran both before and after service. He stated that the veteran had almost lost sight in one eye.

In an August 1991 statement, the veteran indicated that a bazooka exploded on the right side of his face while in service in Germany during combat. The explosion burned his eyebrows and facial hair. He never saw a medic, just brushed it off and went about his business. About six months after discharge, the veteran started losing sight in his right eye. He was hospitalized at the VA hospital in Hot Springs, Arkansas. He believed his right eye condition was caused by the bazooka explosion. In a July 1992 statement, the veteran added that the injury in service occurred in September 1944 while he was building a bridge. He stated that a bazooka round blasted back into his face and blinded his right eye. He received treatment about six months after discharge at VA facilities in both Hot Springs and Little Rock. The veteran provided essentially the same information in an undated later to a service acquaintance.

A statement from a VA physician dated in December 1992 described the veteran's report of a bridge exploding from underneath him during World War II, with a loss of vision on the right since that incident. Findings on physical examination included right macular chore-retinal scar and left chore-retinal scar. The VA physician stated that it is not inconceivable that the macular and retinal lesions in each eye, particularly on the right,

could have occurred secondary to trauma, as stated by the veteran.

G. Stainer, M.D., related in a September 1993 statement that the veteran was apparently involved in a battle in service in which a bridge blew up underneath him. He fell and injured his right eye. Following the fall, he was never able to see properly out of the right eye. Examinations findings included large chorioretinal scar involving the right macula and a large chorioretinal scar on the left eye. Dr. Stainer indicated that this type of macular injury in the right eye "can certainly be concussive in character and his history supports the visual acuity loss from his injury in World War II."

In a September 1993 statement, J.J.V. indicated that he does not know the veteran personally. He was at the same battle area where the veteran alleged to have injured his right eye. The veteran told him he injured his right eye while loading a bazooka.

Correspondence from the veteran dated in October 1993 again described how he injured his right eye in service, noting that there were no medics to whom he could report. He added that he was the only one to leave the battle alive so there were no witnesses to his injury. In about December 1945, he was refused employment as a demolitions specialist because of blindness in the right eye. About six months later, the veteran went to an eye doctor, who referred him to the VA hospital in Little Rock. He ultimately saw another private physician as well as VA doctors in Hot Springs. Finally, the veteran stated that reports of the injury provided in the December 1992 VA doctor statement and the September 1993 statement from Dr. Stainer,

indicating that a bridge exploded from underneath him, were incorrect.

In the veteran's November 1994 substantive appeal, he related that, a few months after his injury, he was transferred from the infantry to an ordnance company because he could not see well enough to shoot.

The veteran testified at a personal hearing in January 1995. He described how his face and eye brows were burned from the bazooka blast in September 1944. He did not know anything was wrong with the eye until he was transferred to a field hospital in France where he stayed for about two weeks. He did not receive any care for the eye. When he returned to his unit, he realized he could not see out of his right eye and told his commanding officer. He was transferred to an ordnance unit. The veteran again related his post-service history of treatment for the eye.

During the hearing, the veteran submitted a medical records from J. Shuler, M.D., reflecting an evaluation performed in December 1994. Notes indicate that the veteran felt that his right eye vision loss was due to trauma in 1944. At that time, he suffered bums to the right side of the face with eye damage. Findings on examination were provided. The impression was retinal pigment epithelium atrophy secondary to old trauma. Also during the hearing, the veteran submitted copies of letters he sent to his mother. In November 1944, he related that he had been sick with chills and fever and had a boil on his knee. In January 1945, he wrote that he had been transferred to ordnance.

The veteran was afforded a VA ophthalmology examination in December 2000. He reported injuring the right eye in September 1944 when a bazooka exploded in his face. He was hospitalized for the injury. He related that he noticed decreased vision in the right eye three days after he left the hospital. The examination included comprehensive physical evaluation as well as review of the veteran's VA medical evidence, service medical records, and the records of the veteran's December 1948 hospitalization. The assessment included decreased vision of the right eye from macular scar, cause unknown. Considering the veteran's right eye visual acuity as recorded at entrance to and separation from service, 20/20 and 20/25, respectively, the examiner opined that it was unlikely that the decrease in vision was related to trauma. Although the veteran reported the trauma as occurring in September 1944 with noted decrease in vision three days later, there is no documented evidence of reduced vision until 1948. Those records showed that the veteran reported at that time that the vision loss started only six months before the visit. Although it was possible that there was damage to the retina in 1944 that hemorrhaged in 1948, there were no other signs of ocular trauma. The examiner added that the chorioretinitis was most likely infectious in nature, although the etiology and onset of the infection was impossible to determine at this time. Based on the documented records, the examiner concluded that the veteran did not lose vision while on active duty.

In August 2001, the veteran underwent another VA ophthalmology examination. He stated that his right eye was injured in 1944 due to a bazooka blast that

resulted in severe decreased vision in the right eye. The impression following examination included dense macular scar of the right eye with small punched out scars in both eyes. The examiner stated that the etiology of the macular scar was difficult to ascertain. If the veteran's vision had bee normal in the right eye before the reported injury, then it was possible that the macular scar could be related to the injury as the veteran states. However, because the veteran had punched out chorioretinal scars in both eyes, it was possible that the etiology of the macular scar was toxoplasmosis.

Analysis

Service connection may be granted if the evidence demonstrates that a current disability resulted from an injury or disease incurred or aggravated in active military service. 38 U.S.C.A. § 1110 (West 2002); 38 C.F.R. § 3.303(a) (2003). Service connection generally requires evidence of a current disability with a relationship or connection to an injury or disease or some other manifestation of the disability during service. *Boyer v. West*, 210 F.3d 1351, 1353 (Fed. Cir. 2000). Where the determinative issue involves medical causation or a medical diagnosis, there must be competent medical evidence to the effect that the claim is plausible; lay assertions of medical status do not constitute competent medical evidence. *Grottveit v. Brown*, 5 Vet. App. 91, 93 (1993); *Espiritu v. Dewinski*, 2 Vet. App. 492, 494 (1992).

A disorder may be service connected if the evidence of record reveals that the veteran currently has a disorder that was chronic in service or, if not chronic,

that was seen in service with continuity of syrnptomatology demonstrated thereafter. 38 C.F.R. § 3.303(b); *Savage v. Gober*, 10 Vet. App. 488, 494-97 (1997). Evidence that relates the current disorder to service must be medical unless it relates to a disorder that may be competently demonstrated by lay observation. *Savage,* 10 Vet. App. at 495-97. For the showing of chronic disease in service, there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "chronic." 38 C.F.R. § 3.303(b).

Disorders diagnosed after discharge may still be service connected if all the evidence, including pertinent service records, establishes that the disorder was incurred in service. 38 C.F.R. § 3.303(d).

If an injury or disease was alleged to have been incurred or aggravated in combat, such incurrence or aggravation may be shown by satisfactory lay evidence, consistent with the circumstances, conditions, or hardships of combat, even if there is no official record of the incident. 38 U.S.C.A. § 1154(b); 38 C.F.R. § 3.304(d). "Satisfactory evidence" is credible evidence. *Collette v. Brown*, 82 F.3d 389, 392 (1996). Such credible, consistent evidence may be rebutted only by clear and convincing evidence to the contrary. 38 U.S.C.A. § 1154(b); 38 C.F.R. § 3.304(d). The statute, does not establish a presumption of service connection, but eases the combat veteran's burden of demonstrating the occurrence of some in-service incident to which the current disability may be connected. *See Clyburn v. West*, 12 Vet. App. 296 (1999); *Caluza v. Brown*, 7 Vet.

App. 498, 507 (1995). That is, it may provide a factual basis for determining that a particular injury was incurred in service but not a basis to establish an etiological link between the in-service injury and the current disorder. *Cohen v. Brown*, 10 Vet. App. 128, 138 (1997) (citing *Libertine v. Brown*, 9 Vet. App. 521,524 (1996); *Caluza*, *supra*).

When there is an approximate balance of positive and negative evidence regarding any issue material to the determination, the benefit of the doubt is afforded the claimant. 38 U.S.C.A. § 5107(b).

In this case, service medical records are negative for any complaint or treatment of a right eye injury, facial burns, or any sort of injury potentially associated with the injury the veteran's alleges to have incurred in September 1944. Although service medical records reflect admission for medical care in November 1944, treatment was provided for cellulitis of the right leg. The Board also notes that statements from J.M.F. and J.J.V., as well as the veteran's letters to his mother in 1944 and 1945, do not support the veteran's allegation that he sustained a right eye injury in service. Neither lay statement purports to have first-hand knowledge of the alleged injury. The veteran's letters home, both written well after the date the injury was alleged to have occurred, do not describe any eye injury or complaint of vision loss.

The Board acknowledges that the veteran alleges that this injury occurred during the course of a battle. Thus, pursuant to 38 U.S.C.A. § 1154(b), the Board may presume that the injury itself occurred, despite the lack of official record. However, even assuming that the

injury described by the veteran actually occurred, subsequent service medical records fail to demonstrate any report or finding of vision loss in the right eye, which the veteran alleges to have noticed in service. The report of physical examination at separation in September 1945 shows uncorrected vision of 20/25 in the right eye. Although vision at the entrance examination is recorded as 20/20 in the right eye, this evidence does not reflect the type of serious vision loss, i.e., inability to see well enough to shoot, the veteran relates he noticed in service. Thus, the Board cannot conclude that there is evi-dence of chronic right eye disorder in service. 38 C.F.R. § 3.303(b); *Savage*, 10 Vet. App. at 494-95.

The first post-service evidence of right eye disorder is shown in hospitalization records dated in December 1948. The veteran's statements at that time offered for the purpose of treatment indicate that the right eye symptoms began only six months before. There is no mention of prior eye injury, during service or at any oth-er time, and no description of bums or eye injury from a bazooka blast. In fact, in his December 1948 claim, the veteran also described the disorder as beginning in June 1948 and failed to report any eye-related problems in service. Thus, even assuming the in-service incurrence of right eye injury pursuant to 38 U.S.C.A. § 1154(b), at least as of the time of the December 1948 hospitalization and claim, the veteran offered no evidence of continuous symptoms involving the right eye after service. 38 C.F.R. § 3.303(b); *Savage*, 10 Vet. App. at 496-97.

Moreover, the Board finds that the competent and probative evidence of record does not establish a rela-tionship between the right eye choroidoretinitis and the alleged injury presumed to have been incurred in

service under 38 U.S.C.A. § 1154(b). Initially, the Board observes that the veteran has expressed his personal belief that his right eye problems are the result of a blast to his from a bazooka while in service. The veteran is certainly competent to relate and describe events or incidents he experienced in service. However, as a lay person without medical training or education, he is not competent to offer an opinion as to the etiology of a medical disorder. *Grottveit*, 5 Vet. App. at 93; *Espiritu*, 2 Vet. App. at 494.

Review of the record reveals conflicting medical opinions as to the etiology of the right eye disorder at issue. The Board has a duty to analyze the credibility and probative value of the evidence of record. *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997); *Wensch v. Principi*, 15 Vet. App. 362, 367 (2001); *Owens v. Brown*, 7 Vet. App. 429, 433 (1995). When adequately explained, the Board is free to favor one medical opinion over another. *Evans v. West*, 12 Vet. App. 22, 26 (1998).

The December 1992 statement from the VA physician and the September 1993 statement from Dr. Stainer both suggest that it is possible that the veteran's right eye disorder could have resulted from the trauma he described. First, the Board notes that each opinion appears to be based solely on the history of injury provided by the veteran, as well as current physical examination. There is no indication that either physician had access to service medical records or other relevant evidence. A medical opinion that relies on history as related by the veteran is no more probative than the facts alleged by the veteran. *Swann v. Brown*, 5 Vet. App. 229, 233 (1993). However, as discussed above, we can presume that the veteran suffered injury during combat

according to the provisions of 38 U.S.C.A. § 1154(b). On this point, the Board observes that the trauma set forth in each statement is a bridge exploding from underneath the veteran. Dr. Stainer states that the injury could be "concussive in nature." However, the veteran maintains that he sustained the injury, particularly burns, from a blast, not a concussion. In fact, he now maintains that the history of injury from these statements is incorrect. Finally, the Board notes that the opinions from the VA physician and Dr. Stainer are both phrased as possibilities, i.e., that the current right eye disability could have resulted from the injury described by the veteran. An opinion offered in such speculative language and without the benefit of consideration of relevant medical evidence is not particularly probative. See *Bloom v. West*, 12 Vet. App. 185 (1999); *Obert v. Brown*, 5 Vet. App. 30 (1993).

The Board acknowledges that the report of the August 2001 VA ophthalmology examination does not suggest that the examiner had access to or reviewed pertinent medical evidence. In addition, the opinion as to the etiology of the right eye disorder is also speculative, noting that it could be related to the injury described by the veteran or could be related to toxoplasmosis, as the *left* eye also demonstrated chorioretinal scars. Thus, this opinion also lacks significant probative value. *Id*. The December 1994 opinion from Dr. Shuler, though not stated in speculative terms, is also based solely on the history of injury as reported by the veteran, and thus lacks any real probative value. *Id*.

On the other hand, the December 2000 VA ophthalmology examiner affirmatively opines that the veteran did not lost right eye vision during service or due to the

alleged in-service trauma. In fact, she states that the chorioretinitis was most likely infectious in nature. The opinion is supported by explanation with reference to visual acuity at entrance and separation as shown in service medical records, as well as initial findings of visual loss documented in records of the December 1948 post-service hospitalization. The examiner concedes that the veteran could have suffered damage to the retina in 1944 that could have hemorrhaged in 1948, but finds no other evidence of ocular trauma. She could not relate any possible infection to the veteran's period of active service. The Board finds this opinion to be more probative on the issue of whether the veteran's current right eye disorder is related to service. *Evans,* 12 Vet. App. at 26.

In conclusion, the Board finds that the preponderance of the evidence is against service connection for choroidoretinitis of the right eye. 38 U.S.C.A. § 5107(b). Therefore, the appeal is denied.

ORDER

Service connection for choroidoretinitis of the right eye is denied.

/s/ V.L. JORDAN
V. L. JORDAN
Veterans Law Judge, Board of
Veterans' Appeals

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 06-7092

PATRICIA D. SIMMONS, CLAIMANT-APPELLEE

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, RESPONDENT-APPELLANT

Filed: May 16, 2007

Before NEWMAN, MAYER, and PROST, Circuit Judges.

PROST, Circuit Judge.

The Secretary of Veterans Affairs appeals a decision by the United States Court of Appeals for Veterans Claims ("Veterans Court") that vacated and remanded a decision by the Board of Veterans' Appeals ("Board") denying Patricia D. Simmons's claim for service connection for hearing loss in her right ear and for an increased rating for hearing loss in her left ear. *Simmons v. Nicholson,* No. 03-1731, 2005 WL 3312625 (Vet. App. Dec. 1, 2005). Because the Veterans Court properly placed the burden on the Secretary to establish that an error in a notice the Department of Veterans Affairs ("VA") was required to give Ms. Simmons was not prejudicial, we affirm and remand for further proceedings.

I. BACKGROUND

Ms. Simmons served in the United States Navy from December 1978 to April 1980. Upon her discharge in April 1980, she filed a claim with the VA for disability benefits for hearing loss in her left ear. In November 1980, the VA regional office ("VARO") determined that Ms. Simmons's in-service work environment had aggravated a pre-existing hearing impairment in her left ear, causing further hearing loss. The VARO concluded, however, that her degree of hearing loss did not warrant compensation under the applicable rating schedule.

In March 1998, Ms. Simmons asked the VARO to reopen her claim for disability compensation for her left-ear hearing loss and to amend her claim to include a request for compensation for hearing loss in her right ear. The VARO denied her claim in August 1998. On appeal, the Board remanded her claim back to the VARO, directing it to, among other things, comply with the notice requirements imposed by the newly-enacted Veterans Claims Assistance Act of 2000 ("VCAA"), 38 U.S.C. § 5103(a).[1]

Accordingly, on remand, the VARO sent Ms. Simmons a letter in March 2001 in an effort to comply with the VCAA notice requirements. Subsequently, the VARO denied Ms. Simmons's claim. The Board affirmed.

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[1] The notice requirements of § 5103(a) are described in more detail below and in our opinion in *Sanders v. Nicholson*, 487 F.3d 881, No. 06-7001, 2007 WL 1427720 (Fed. Cir. May 16, 2007). In essence, § 5103(a) requires the VA to notify claimants of the evidence needed to substantiate their claims.

Ms. Simmons appealed to the Veterans Court, arguing, in part, that the VA failed to comply with the VCAA notice requirements. Specifically, Ms. Simmons contended that the VA's March 2001 letter failed to identify (1) the information or evidence needed to substantiate her claim for an increased rating, (2) which portion of the information and evidence, if any, was to be provided by Ms. Simmons, and (3) which portion, if any, the Secretary would attempt to obtain on her behalf.

The Veterans Court agreed with Ms. Simmons and remanded her claim for further proceedings. According to the Veterans Court, the VCAA required the VA to notify Ms. Simmons of the evidence needed to establish a claim for an increased disability rating. But instead of identifying the evidence needed for an increased-rating claim, the March 2001 notice letter erroneously stated that Ms. Simmons's claim required evidence to establish the three elements of service connection-elements that had already been established back in November 1980. Such an error, the court held, "constitute[d] a VA failure to 'provide a key element of what it takes to substantiate her claim, thereby precluding her from participating effectively in the processing of her claim, which would substantially defeat the purpose of section 5103(a) notice.'" *Simmons,* 2005 WL 3312625, at *7 (quoting *Mayfield v. Nicholson,* 19 Vet. App. 103, 122 (2005) ("*Mayfield I*"), *rev'd on other grounds,* 444 F.3d 1328 (Fed. Cir. 2006)). Because it held that this type of error had "the natural effect of producing prejudice," the court placed the burden on the VA to demonstrate that Ms. Simmons was not prejudiced by the defective notice letter. *Id.* And because the VA did not meet this burden, the court remanded Ms. Simmons's claim for fur-

ther development and directed the VA to comply with the VCAA notice requirements.

The Secretary of the VA appeals to this court. We have jurisdiction under 38 U.S.C. § 7292. *See Conway v. Principi,* 353 F.3d 1369, 1373-74 (Fed. Cir. 2004).

II. DISCUSSION

A. Standard of Review

In reviewing a Veterans Court decision, this court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions" and set aside any regulation or interpretation thereof "other than a determination as to a factual matter" relied upon by the Veterans Court that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." 38 U.S.C. § 7292(d)(1) (2006). We review questions of statutory interpretation de novo. *Summers v. Gober,* 225 F.3d 1293, 1295 (Fed. Cir. 2000). Except to the extent that an appeal presents a constitutional issue, this court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

B. Prejudicial Error Rule in the VCAA Context

This case requires us to interpret the meaning of "the rule of prejudicial error" as it applies to the notice requirements of the VCAA. Our opinion in *Sanders v. Nicholson,* 487 F.3d 881, No. 06-7001, 2007 WL 1427720 (Fed. Cir. May 16, 2007), which is being issued concur-

rently with this opinion, resolves this issue. Accordingly, we will provide only a brief summary here.

The VCAA notice requirements are contained within 38 U.S.C. § 5103(a), which states:

> Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

The statutory notice requirement of § 5103(a) is implemented in 38 C.F.R. § 3.159(b)(1), which provides, in pertinent part:

> When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim.

As we explain in *Sanders*,

> the notice required by the VCAA can be divided into four separate elements: (1) notice of what information or evidence 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. Errors with regard to these elements are referred to as first-element, second-element, third-element, and fourth-element notice errors, respectively.

487 F.3d at 886.

In *Conway v. Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004), this court held that the Veterans Court must review appeals alleging VCAA notice errors for prejudicial error. The basis for our holding in *Conway* was 38 U.S.C. § 7261(b)(2), which states that the Veterans Court shall "take due account of the rule of prejudicial error" when reviewing the record of proceedings before the Secretary and the Board of Veterans' Appeals. The court in *Conway,* however, did not express an opinion as to what it means for the Veterans Court to "take due account" of the rule, nor did it define what constituted prejudicial error. *Conway,* 353 F.3d at 1375.

Subsequently, in *Mayfield I,* the Veterans Court took it upon itself to address how to apply the rule of prejudicial error in the context of the VCAA notice requirements. First, the court held that a claimant asserting a VCAA notice error bears the initial burden of establishing that a notice error has, indeed, been commit-

ted, by referring to specific deficiencies in the documents in the record on appeal, including any documents that may have been relied on as satisfying the notice requirements of § 5103(a). *Mayfield I*, 19 Vet. App. at 111.

Next, the court in *Mayfield I* held that "an error is prejudicial if it affects the 'substantial rights' of the parties in terms of 'the essential fairness of the [adjudication].'" *Id*. at 115 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)). With respect to the first notice element—notice regarding the information and evidence necessary to substantiate the claim—the court held that the natural effect of an error would be to "preclud[e the claimant] from participating effectively in the processing of her claim, which would substantially defeat the very purpose of section 5103(a) notice." *Id*. at 122. Accordingly, the court concluded that a first-element notice error should be presumed prejudicial, and that the VA had the burden of demonstrating that the claimant was not prejudiced by the notice error. *Id*.

In this case, the Veterans Court applied the *Mayfield I* framework to Ms. Simmons's claim that the March 2001 letter did not comply with the notice requirements of the VCAA. First, the court determined that the March 2001 letter did not identify the information and evidence necessary to substantiate Ms. Simmons's claim—a first-element notice error. Next, the court placed the burden on the Secretary to demonstrate that Ms. Simmons was not prejudiced by the defective notice. That is, the court required the Secretary to demonstrate that the purpose of the notice was not frustrated—for example, by demonstrating: (1) that any

defect in notice was cured by actual knowledge on the part of Ms. Simmons, (2) that a reasonable person could be expected to understand from the notice provided what was needed, or (3) that a benefit could not possibly have been awarded as a matter of law. Because the VA did not meet this burden, the court remanded Ms. Simmons's claim for further development and directed the VA to comply with the VCAA notice requirements.

On appeal to this court, the Secretary does not take issue with the Veterans Court's determination that the March 2001 notice letter contained a first-element notice error. Instead, the Secretary argues that the Veterans Court misinterpreted the rule of prejudicial error when it presumed that the defective notice was prejudicial to Ms. Simmons and placed the burden on the VA to demonstrate otherwise. According to the Secretary, the Veterans Court should have placed the burden on Ms. Simmons to establish that she was prejudiced by the defective notice.

Our opinion in *Sanders* resolves this issue. As we stated in *Sanders,* once the veteran establishes that the VA has committed a VCAA notice error, the Veterans Court should presume that such error was prejudicial to the veteran. *Sanders,* 487 F.3d at 891. The VA may rebut this presumption by establishing that the error was not prejudicial to the veteran. *Id*. Consequently, for the reasons set forth in *Sanders,* we reject the Secretary's argument and hold that the Veterans Court properly placed the burden on the Secretary to establish that the notice error was not prejudicial.

III. CONCLUSION

The decision of the Veterans Court is affirmed. The case is remanded for further proceedings.

COSTS

No costs.

AFFIRMED AND REMANDED

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 06-7092

PATRICIA D. SIMMONS, CLAIMANT-APPELLEE

v.

GORDON H. MANSFIELD, ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT-APPELLANT

[Filed: Oct. 24, 2007]

ORDER

A petition for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, IT IS

ORDERED that the petition for rehearing be, and the same hereby is DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is DENIED.

The mandate of the court will issue on October 31, 2007.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: 10/24/2007

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 03-1731

PATRICIA D. SIMMONS, APPELLANT

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

MEMORANDUM DECISION

[Dec. 1, 2005]

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

Before DAVIS, *Judge*.

DAVIS, *Judge:* The appellant, veteran Patricia D. Simmons, through counsel, appeals from a June 3, 2003, decision of the Board of Veterans' Appeals (Board or BVA) that denied her claim for Department of Veterans Affairs (VA) secondary service connection for a right-ear hearing loss disability and denied her increased-rating claim for a left-ear disability rating. Record (R.) at 11. Each party filed a brief and the appellant has also filed a reply brief. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and

7266(a) to review the June 2003 Board decision. Single-judge disposition is appropriate here because the case is one of relative simplicity whose outcome is controlled by the Court's precedents and is not "reasonably debatable". *Frankel* v. *Dewinski,* 1 Vet. App. 23,25-26 (1990). For the reasons provided below, the Court will vacate the June 2003 Board decision and remand the matter for further readjudication consistent with this decision.

I. Relevant Background

Veteran Patricia Simmons served on active duty in the U.S. Navy from December 1978 to April 1980. R. at 15. Three months into her tour of duty, Mrs. Simmons underwent a routine VA medical examination and was diagnosed as having hearing impairment. R. at 17-18. While on duty, she worked in "yellow gear" (otherwise referred to as flight deck support gear or aircraft handling equipment), which constantly required her to be in a noisy work environment. R. at 46. As a consequence of such work, upon her discharge from naval service, Mrs. Simmons' hearing had become increasingly impaired. R. at 42. In April 1980, she filed with a VA regional office (RO) an application for VA disability benefits for hearing loss in her left ear. R. at 50-51. In November 1980, the RO concluded that Mrs. Simmons' in-service work environment aggravated her left-ear hearing loss condition; however, under the applicable rating schedule, it concluded that her claim did not warrant compensable service connection. R. at 67. Despite the numerous audiological examinations and medical evidence collected in support of her left-ear hearing loss disability since November 1980, the Board concluded in its decision on appeal that there was no medical evidence

in the record warranting an increased rating for that condition. R. at. 11.

In March 1998, Mrs. Simmons requested the RO "amend her service[-]connection claim to include [her] right[-]ear hearing loss," on the grounds that "since the decrease of [her] hearing in [her] left ear has gotten worse it is causing [her] right ear to have to work harder and has caused a hearing loss in the right ear." R. at 124. In August 1998, the RO denied Mrs. Simmons' right-ear hearing loss claim because it "neither occurred in nor was caused by service." R. at 153. However, on appeal, the Board remanded the matter to the RO for it to determine whether her right-ear hearing loss claim qualified for secondary service connection as well as to, among other things, (1) comply with VA's duty-to-assist and duty-to-notify requiremetns under the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (VCAA), and (2) obtain a VA medical examiner's opinion "as to whether it is at least as likely as not that hearing loss in the right[] ear is caused by her service[-] connected left[-]ear hearing loss and whether it is least as likely as not that her service[-]connected left[-]ear hearing loss results in an increase in severity of her right[-]ear hearing loss." R. at 189.

On remand, the RO underwent several actions in an attempt to meet the Board's remand requirements and to process her claims in preparation for a final determination. First, in March 2001, the RO sent her a letter regarding the enactment of the VCAA, and of VA's duty-to-assist and duty-to-notify requirements pursuant to that statute and implementing regulations. R. at 192-96. In addition, the R0 scheduled a VA medical examination

to evaluate Mrs. Simmons' right-ear hearing loss in January 2002; however, the record indicates that she failed to report to that scheduled examination. R. at 214. The following month, the RO wrote Mrs. Simons a letter, notifying her of the potentially adverse impact on her claim for failing to report to a scheduled examination without good cause and requesting the reasons for why she failed to show in January 2002. R. at 216. In April 2002, Mrs. Simons wrote the RO a letter informing it that she had recently moved, listing her current address as "[**REDACTED**]," that as a result of this change in address, she did not receive the RO's February 2002 letter, and that she would be available to appear for another VA medical examination, and the RO should contact her at her current address. R. at 220 (emphasis added).

The record indicates that the RO scheduled a, second VA medical examination in November 2002 and that Mrs. Simmons again failed to show. R. at 229. The record does not indicate to which address the RO sent the notice of examination. In December 2002, the RO wrote her another letter, noting that she did not report to a scheduled VA medical examination in November 2002, again informing her of the potentially adverse impact on her claim for failing to report to a scheduled examination without good cause, and requesting the reasons for her failure to show. R. at 237. That letter was incorrectly addressed to "[**REDACTED**]." *Id.* (emphasis added). The record does not indicate the address to which that envelope containing that letter was sent.

In February 2003, the RO submitted to Mrs. Simmons a Supplemental Statement of the Case (SSOC), also incorrectly addressed to "[**REDACTED**]," informing her, among other things, that she forfeited her right to a VA medical exam by failing to appear twice for sched-

uled examinations, and based on the evidence previously obtained, her claim did not establish service connection. R. at 242-49 (emphasis added). In its June 2003 decision on appeal, the Board first concluded that VA had fully complied with its duty-to-assist and duty-to-notify requirements under the VCAA. As to her right-ear hearing loss claim, the Board concluded that without a VA medical examination, the evidence presented did not provide competent medical evidence of "linkage" between her military service and her right-ear hearing loss condition. R. at 8-10. In addition, as noted above, the Board concluded that with regard to Mrs. Simmons' left-ear hearing loss condition, the evidence presented did not warrant compensable service connection and therefore denied her increased-rating claim. R. at 10-11.

II. Contentions on Appeal

On appeal, Mrs. Simmons argues that the Court should reverse the March 2004 Board decision's findings regarding her right-ear hearing loss claim on the grounds that she entitled to service connection for that claim as a matter of law. Appellant's Brief (Br.) at 25. She asserts that the Board's findings with regard to her right-ear hearing loss claim are "clearly erroneous because her service medical records clearly document as increase in right-ear hearing loss in service." *Id*. at 18. She also asserts that her right-ear hearing loss was aggravated in service, that she is entitled to a presumption that her hearing loss was aggravated in service, and that no competent medical evidence in the record rebuts that presumption. *Id*. at 18-19. In addition, Mrs. Simmons contends that she was never properly notified of the November 2002 VA medical examination because such notification was not sent to her correct address. Appel-

lant's Reply Br. at 3-5. Furthermore, the appellant asserts that the Secretary failed to fulfill his duty-to-notify obligations under 38 U.S.C. § 5103(a) by not (1) identifying the information or evidence needed to substantiate her claim and (2) by not indicating which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary would attempt to obtain on behalf of the claimant. Appellant's Br. at 22.

In response, the Secretary filed a brief, asserting, inter alia, that the appellant's arguments are unsupported by the law and facts presented, and therefore, requests that the Court affirm the June 2003 Board decision. Secretary's Br. 24. As to the merits of Mrs. Simmons' right-ear hearing loss claim, the Secretary contends that the record provided a plausible basis for the Board's decision on the grounds that there was no medical evidence to demonstrate her contention that her right-ear hearing loss was related to her service-connected left-ear hearing loss disability, nor was there medical evidence demonstrating direct service connection. *Id*. at 10. The Secretary notes in his brief that because Mrs. Simons failed to report to her scheduled VA medical examination without good cause, the Board had authority pursuant to 38 C.F.R. § 3.655 (2004) to evaluate the claims based on the evidence currently existing in the record. *Id*. at 10-11. The Secretary also notes that the Court should not consider Mrs. Simmons' direct service-connection claim for her right-ear hearing loss because it was not raised below. *Id*. at 11. Alternatively, the Secretary contends that there is no competent medical evidence warranting a direct service-connection award for her right-ear hearing loss claim. As to the appellant's duty-to-notify argument, the Secre-

tary contends that the RO's communications, particularly its March 2001 VCAA notice letter, adequately informed the appellant of what evidence and information was necessary to substantiate her claim, and who was responsible for providing that evidence. *Id*. at 15-24.

III. Applicable Law and Analysis

A. Mrs. Simmons' Right-Ear Hearing Loss Claim

1. *Duty to Ensure Compliance with BVA Remand Orders*

"[A] remand by this Court or by the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand order." *Stegall v. West*, 11 Vet. App. 268, 271 (1998). This Court has further held that the Secretary, in fulfillment of his obligations under 38 U.S.C. § 303, is required to ensure compliance with the terms of the remand and that "where, as here, the remand orders of the Board or this Court are not complied with, the Board itself in failing to [ensure] compliance." *See id*. Such an error may constitute a basis for remand. See *id*. The Board must also provide an adequate statement of reasons or bases for its decision. *Gilbert v. Derwinski*, 4 Vet. App. 49, 56-57 (1990). An adequate statement of reasons or basis must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of any material evidence favorable to the veteran. *See* 38 U.S.C. § 7104(d)(1); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert* 1 Vet. App. At 56-57.

2. *Presumption of Regularity of Mailing*

There is a presumption of regularity under which it is presumed that government officials "have properly

discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *Ashley v. Derwinski*, 2 Vet. App. 307, 308 (1992); *see also Crain v. Principi*, 17 Vet. App. 182, 190 (2003) (noting that the Court has routinely applied this presumption of regularity and its caselaw regarding the mailing requiremetns under 38 U.S.C. § 7104(e) to RO mailings to VA claimants); *Jones v. West*, 12 Vet. App. 98, 100-02 (1998) (applying the presumption of regularity to notice of VA medical examinations). Because the RO mailed the notice to the appellant's last-known address, VA is presumed to have properly discharged its official duty to mail notice to the veteran of the November 2002 VA medical examination and, subsequently, notice of her failure to report. *See Crain,* 17 Vet. App. at 186; *Ashley*, 2 Vet. App. at 309 (concluding the mailing of notice of BVA decision pursuant to 38 U.S.C. § 7104(e) must be sent to claimant at claimant's last known address" of record). However, that presumption can be rebutted by submission of "clear evidence of the contrary." A*shley*, 2 Vet. App. At 309 (citing *Rosler* v. *Derwinski*, 1 Vet. App. 241, 242 (1991); *see also YT v. Brown*, 9 Vet. App. 195, 199 (1996); *Mindenhall v. Brown*, 7 Vet. App. 271, 274 (1994). Where an appellant submits clear evidence to the effect that BVA's "regular" mailing practices are not regular or that the were not followed, the Secretary is no longer entitled to the benefit of the presumption, and the burden shifts to the Secretary to establish that the RO's communication was mailed to the veteran and veteran's representative, if any. *See Ashley, supra.*

3. *Application of Law to Facts*

In the instant case, the appellant asserts that "the incorrectly addressed RO letter of December 27, 2002,

is substantial evidence that VA did not mail appellant notification of the November 2002 VA examination to her correct address." Appellant's Br. at 5. This Court as held, on multiple occasions, that VA's use of an incorrect address for a claimant will constitute the "clear evidence" needed to rebut the presumption of regularity. Most recently, in *Crain*, this Court held that evidence showing a one-digit error in a ZIP Code in conjunction with the appellant's assertion of nonreceipt of the mailing of an SOC constituted sufficient evidence to rebut the presumption of regularity. *See Crain, supra*; *see also Flucker v. Brown*, 5 Vet. App. 296, 298 (1993) (finding clear evidence of an irregular mailing where the BVA decision was mailed to [**REDACTED**], whereas the appellant's correct address was [**REDACTED**]; *Piano v. Brown*, 5 Vet. App. 25, 26-27 (1993) (holding the Board's use of an incorrect address in mailing a copy of a BVA decision to the appellant constituted the clear evidence that was needed to rebut the presumption of regularity that the Board properly mailed notice of its decision to him at his last known address.

Consistent with the Court's decisions in *Crain*, *Flucker*, and *Piano*, all *supra*, a review of the record on appeal requires the Court to find that the appellant has not merely asserted, but has established with clear evidence that she did not receive the notification of her failure to report to a scheduled VA examination. As noted in the appellant's reply brief, after she had informed the RO of her change in address to "[**REDACTED**]," the RO's December 27, 2002, letter, notifying her that she failed to report to a scheduled VA examination, provides a mailing address of "[**REDACTED**]." R. at 237. The next RO communication in the record, a letter dated February 11, 2003, providing the veteran an SSOC, con-

tained the same incorrect address. R. at 242. Based on this evidence, and the Court's decision in *Crain, Flucker,* and *Piano*, all *supra*, the Court finds that the appellant has demonstrated with clear evidence, a mailing irregularity with regards to the RO's mailing of its notice to the veteran of the November 2002 VA medical examination and, subsequently, notice of her failure to report.

Because the Court holds that the presumption of regularity is rebutted, the burden shifts to the Secretary to establish that the December 2002 notice of failure to report to the scheduled VA examination was mailed to the appellant, or that the appellant actually received such notice. In his brief, the Secretary made no effort to carry that burden. In addition, the Board did not address this legal issue in its decision appeal. Therefore, the Board did not provide an adequate statement of reasons or bases for why Mrs. Simmons' right-ear hearing loss claim could be determined without the VA medical examination required by a prior BVA remand, and therefore, did not provide a precise basis for why it had complied with *Stegall*. Accordingly, the Court holds that remand is required for the Board to provide an adequate statement of reasons or bases with regards to these issues. In doing so, the board must ensure that a new VA medical examination is provided for Mrs. Simmons unless the Board must ensure that a new VA medical examination is provided for Mrs. Simmons unless the Board finds that there is "clear evidence" to demonstrate that the appellant was mailed to notice or there is proof of actual receipt of such information by the appellant, a finding the Court believes would be hard to justify based on a review of the record on appeal.

B. Mrs. Simons' Left-Ear Hearing Loss Claim

1. *VCAA Statutory-Notice Compliance*

With regard to her left-ear hearing loss claim, the appellant's only contention on appeal is that she was not provided statutorily adequate VCAA notice under section 5103(a). As amended by the VCAA, 38 U.S.C. § 5103(a) requires the Secretary to inform the claimant of (1) the information and evidence not previously provided to the Secretary that is necessary to substantiate the claim, (2) the portion of that information and evidence, if any, the claimant is expected to provide, and (3) the portion of that information and evidence, if any, the Secretary will attempt to obtain on behalf of the claimant. *See Quartuccio v. Principi*, 16 Vet. App. 183 (2002). In addition, this Court has held that 38 C.F.R. § 3.159(b)(1) (2004) imposes a fourth-notice element, the VA "request that the claimant provide any evidence in the claimant's possession that pertains to the claim." *Pelegrini v. Principi*, 18 Vet. App. 112, 121 (2004). Moreover, section 5103(a) and § 3.159(b)(1) notice requirements must be satisfied prior to an initial unfavorable decision by an agency of original jurisdiction (AOJ) on a claim such that the claimant has a "meaningful opportunity to participate effectively in the processing of his or her claim." *Mayfield v. Nicholson*, 19 Vet. App. 103, 122 (2005), *appeal docketed*, No. 05-7157 (Fed. Cir. June 14, 2005). Failure to comply with any of these requirements may constitute remandable error. *See id*. at 121-22; *Quartuccio*, 16 Vet. App. at 183. In the event that the Court finds such an error, it must "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2); *see Conway v. Principi*, 353 F.3d 1369,

1374-75 (Fed. Cir. 2004); *Mayfield*, 19 Vet. App. at 111-12.

As noted above, under the first-statutory element of section 5103(a), the Secretary is required to inform the claimant of the information and evidence not of record, if any, that is necessary to substantiate his or her claim. 38 U.S.C. § 5103(a). In the context of an increased-rating claim, this Court has noted that "[w]here entitlement to compensation has already been established an increase in the disability rating is at issue, the present level of disability is a primary concern." *Francisco v. Brown*, 7 Vet. App. 55, 58 (1994). Here, the Board concluded in its June 2003 decision that VA had fulfilled its duty-to-notify obligations to the appellant, noting that "[i]n a March 2001 letter, she was notified what evidence she needed to submit in order to substantiate her claims, and what evidence VA would obtain." R. at 3. A review of that letter, and the entire record on appeal, however, fails to reflect that VA properly carried out its notice requirements.

In accordance with this Court's jurisprudence, Mrs. Simmons should have been informed of the evidentiary prerequisites for establishing an increased-rating claim. However, the March 2001 letter did not inform her of that critical information. Rather, under the heading "What Must The Evidence Show to Establish Entitlement?," the March 2001 VCAA notice letter wrongfully informed Mrs. Simmons that she needed to submit evidence establishing the three elements of service connection, evidence she submitted, and a status her claim had previously been awarded since November 1980. R. at 67. Although that letter clearly pertained to her increased-rating claim, that letter failed to inform her

(1) that an increase in severity of her service-connected condition was required and (2) what types of evidence or information was needed, or could be submitted to establish that claim. Therefore, the Board erred in its findings that VA had complied with the first statutory-notice element of the VCAA. In addition, the RO's efforts to satisfy the obligation to inform the veteran as to who would be obligated to provide or seek to obtain which evidence was similarly unsuccessful because those requirements cannot be fulfilled until the first-notice element was satisfied. Accordingly, neither the March 2001 letter nor any other document in the record provided Mrs. Simmons with notice that complied fully with the charges in the law brought about the VCAA. *See Mayfield* and *Quartuccio*, both *supra*.

2. *Prejudicial Error Analysis*

Having found a notice error, the Court must now "take due account of the rule of prejudicial error". 38 U.S.C. § 7261(b)(2) (as amended by Veterans Benefits Act of 2002 (VBA), § 401, Pub. L. No. 107-330, 116 Stat. 2820, 2832); *see Conway,* 353 F.3d at 1374-75. Here, the Court has found that VA failed to comply with all three elements of its statutory-notice requirement under the VCAA. However, because the appellant has not asserted with any specificity how she was prejudiced as a result of non-compliance with the second and third-notice elements, the Court will only address the issue of whether the Secretary committed prejudicial error by not informing the appellant of the information and evidence necessary to substantiate her claim. *See Mayfield,* 19 Vet. App. at 120-24 (noting that except for non-compliance with the first statutory-notice element, which has the "natural effect of producing prejudice, for

the burden of persuasion to shift to the Secretary, the appellant must identify, "with considerable specificity," how the notice was defective, and, what evidence the appellant would have produced or requested the Secretary to obtain had the secretary fulfilled his notice obligations).

As to the first statutory-notice element, the Court in *Mayfield* held that such an error constitutes a VA failure to "provide a key element of what it takes to substantiate her claim thereby precluding her from participating effectively in the processing of her claim, which would substantially defeat the purpose of section 5103(a) notice". *Mayfield*, 19 Vet. App. at 122. Accordingly, because that notice error is such that it would have "the natural effect of producing prejudice," the burden shifts to the Secretary to demonstrate "that there was clearly no prejudice" to the appellant from the notice error in terms of the fairness of the adjudication. *Id*. at 121. As to how the Secretary may meet this burden, this Court held in *Mayfield*.

> [T]he Secretary must demonstrate a lack of prejudice by persuading the Court that the purpose of the notice was not frustrated—e.g., by demonstrating (1) that any defect in notice was cured by actual knowledge on the part of the appellant that certain evidence (i.e., missing information or evidence needed to substantiate the claim) was required and that she should have provided it, or (2) that a reasonable person could be expected to understand from the notice provided what was needed, or (3) that a benefit could not possibly have been awarded as a matter of law.

Id. (citation omitted).

Here, reviewing the record as a whole, the Court cannot conclude that the notice error was nonprejudicial. First, after reviewing the record in its entirety, the Court can find no evidence that Mrs. Simmons had actual knowledge of what evidence was necessary to substantiate her claim. Additionally, as noted above, the record on appeal provides no indication that a reasonable person would have understood, from the notice provided, the information or evidence needed to substantiate her claim. Moreover, the Court cannot say that as a matter of law, with proper notice, Mrs. Simmons could not have obtained a private examination substantiating her claim. *See Short Bear v. Nicholson*, 19 Vet. App. 341 (2005) (Hagle, J., concurring) (noting that the operation of law bases for allowing the Secretary to meet his burden should be utilized only when there are "no immutable fact[s] that disqualify" an appellant from entitlement to their claim). On the basis of the foregoing analysis and because the Court can find no additional reason for holding that the first-notice error here was nonprejudicial to Mrs. Simmons, the Court holds that remand is required for her left-ear hearing loss claim as well as for VA to comply with its duty-to-notify requirements.

IV. Conclusion

On the basis of the foregoing analysis, the record on appeal, and the parties' pleadings, and having "take[n] due account of the rule of prejudicial error" pursuant to 38 U.S.C. § 7261(b)(2), the Court vacates the June 3, 2003, BVA decision and remands the matter for expeditious further development and issuance of an readjudicated decision supported by an adequate statement of reasons or bases consistent with this opinion and in accordance with 38 U.S.C. § 7112 (as added by the Veter-

ans Benefits Act of 2003, Pub. L. No. 108-183, § 707(b), 117 Stat. 2651, 2673) (requiring Secretary to "take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court"); *see Vargas-Gonzalez v. Principi*, 15 Vet. App. 222, 225-30 (2001) (holding that section 302 of the Veterans' Benefits Improvements Act applied to all elements of a claim remanded by Court or Board), and in accordance with all applicable law and regulation. *See Allday v. Brown*, 7 Vet. App. at 533-34. On remand, the appellant will be free to submit additional evidence and argument. *See Kay v. Principi*, 16 Vet. App. 529, 534 (2002). A remand by this Court or by the Board confers on an appellant the right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. *See Stegall*, 11 Vet. App. at 271. A final decision by the Board following the remand herein ordered will constitute a new decision that, if adverse, may be appealed to this Court only upon the filing of a new Notice of Appeal with the Court no later than 120 days after the date on which notice of the Board's new final decision is mailed to the appellant. *See Marsh v. West*, 11 Vet. App. 468 (1998).

VACATED and REMANDED.

DATED: [Dec. 1, 2005]

APPENDIX H

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

Docket No. 99-22-149A
SS 046 62 3412

IN THE APPEAL OF PATRICIA D. SIMMONS

Date: [June 3, 2003]

On Appeal from the
Department of Veterans Affairs Regional Office in
Winston-Salem, North Carolina

THE ISSUES

1. Entitlement to service connection for right ear hearing loss.
2. Entitlement to a compensable rating for left ear hearing loss.

REPRESENTATION

Appellant represented by North Carolina Division of Veterans Affairs

ATTORNEY FOR THE BOARD

R. A. Seaman, Associate Counsel

INTRODUCTION

The appellant is a veteran who had active service from December 1978 to April 1980. This matter comes before the Board of Veterans' Appeals (the Board) on appeal from an August 1998 rating decision of the Department of veterans Affairs (VA) Regional Office (RO) in Winston Salem, North Carolina. The case was before the Board in February 2001, when it was remanded for further development.

FINDINGS OF FACT

1. The veteran's right ear hearing loss disability was not manifested in service or to a compensable degree in the first postservice year, and there is no competent evidence relating it to service or to her service-connected left ear hearing loss.

2. The veteran's left ear hearing acuity is no worse than Level VI.

CONCLUSIONS OF LAW

1. Service connection for right ear hearing loss is not warranted. 38 U.S.C.A. §§ 1110, 1112, 1113, 1131, 1137, 5107 (West 2002); 38 C.F.R. §§ 3.303, 3.304, 3.307, 3.309, 3.310 (2002).

2. A compensable rating for left ear hearing loss is not warranted. 38 U.S.C.A. §§ 1155, 5107 (West 2002); 38 C.F.R. § 4.85, Diagnostic Code (Code) 6100, Tables VI and VII, § 4.86 (2002).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

There has been a significant change in the law during the pendency of this appeal. On November 9, 2000, the

Veterans Claims Assistance Act of 2000 (VCAA), (codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107 (West 2002)) became law. Regulations implementing the VCAA have been published. 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.32(a) (2002). The VCAA and implementing regulations apply in the instant case. See VAOPGCPREC 11-2000.

There has been substantial compliance with the pertinent mandates of the VCAA and implementing regulations. The case has been considered on the merits, and well-groundedness is not an issue. In the August 1998 decision, in an October 1999 statement of the case, and in supplemental statements of the case issued in October 2000 and February 2003, the veteran was notified of the evidence necessary to substantiate her claims, and of what was of record. In a March 2001 letter, she was notified what evidence she needed to submit in order to substantiate her claims, and what evidence VA would obtain. The letter clearly explained that VA would make reasonable efforts to help the veteran get pertinent evidence, but that she was responsible for providing sufficient information to VA to identify the custodian of any records. *See Quartuccio v. Principi*, 16 Vet. App. 183 (2002).

The veteran was accorded VA examinations in 1999, 2001, and August 2002. She failed (without explanation) to report for a VA audiological examination to determine the etiology of her right ear hearing loss scheduled in November 2002. Correspondence from the RO to the veteran, sent to her last known address, has not been returned as undeliverable.

The Board notes that the "duty to assist" the veteran in the development of facts pertinent to her claim is not a "one-way street." *See Wood v. Derwinski*, 1 Vet. App. 190 (1991). The veteran must also be prepared to meet her obligations by cooperating with VA's efforts to provide an adequate medical examination and submitting to the Secretary all medical evidence supporting a claim. *Olson v. Principi*, 3 Vet. App. 480 (1992).

The RO has obtained the veteran's service medical records and all identified records from postservice medical care providers, and she has been accorded VA examinations. There is no indication that there is any relevant evidence outstanding, and nothing to suggest that another examination is indicated. Development is complete to the extent possible; VA's duties to notify and assist, including those mandated by the VCAA, are met.

Background

By a November 1980 decision, the RO granted service connection for left-ear hearing loss, rated noncompensable. Essentially, the veteran maintains that her left ear hearing loss is sufficiently disabling to warrant a compensable rating. She further contends that service connection is warranted for right, ear hearing loss, as she now has such hearing loss that is causally related to her service-connected left ear hearing loss.

Service medical records show that on March 1978 examination prior to induction, audiometric studies showed that puretone thresholds, in decibels, were:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	20	5	5	5	5
LEFT	35	20	35	25	15

In a March 1980 hearing conservation consultation report, it was noted that the veteran worked in a noisy environment during service, and audiometric examination on her entry to active duty had revealed she had left ear hearing loss that preexisted service. On March 1980 examination for separation from service the diagnosis was high and low frequency hearing loss in the left ear. Audiometric studies showed that puretone thresholds, in decibels, were:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	15	10	5	5	15
LEFT	35	35	45	30	30

Postservice private medical records include a September 1980 letter from a clinical audiologist who reported that private audiometric studies in August 1989 showed essentially normal hearing in the right ear and severe to profound hearing loss in the left ear. It was noted that

the left ear hearing loss appeared to be predominantly conductive in nature, but had some sensorineural component.

On March 1998 VA audiological evaluation, audiometry revealed the puretone thresholds, in decibels, were:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	45	45	40	45	40
LEFT	75	75	70	75	85

The examiner reported that the veteran's right ear hearing was normal in 1989, but currently showed right ear hearing loss with a significant conductive component. Other VA outpatient reports indicate diagnosis of bilateral mixed-type hearing loss, (greater in the left ear), and further indicate that surgery was recommended.

On VA audiological evaluation in June 1999, the veteran reported that she experienced noise exposure in service launching aircraft while working on the flight line. She stated that she could not hear unless she was looking at the person speaking. Audiometry revealed that puretone thresholds, in decibels, were:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	65	55	45	45	45
LEFT	85	65	60	70	80

Speech audiometry revealed speech discrimination ability of 96 percent correct in the right ear and 72 percent correct in the left ear. The average puretone thresholds for the 1000, 2000, 3000, and 4000 Hertz frequencies were 48 decibels in the right ear and 69 decibels in the left ear. The diagnosis was moderate to severe mixed hearing loss in the right ear, and moderately-severe to severe mixed hearing loss in the left ear. The examiner recommended an otologic evaluation because the veteran's mixed-type hearing loss was suggestive of middle ear pathology.

A report of private audiometric examination in August 2000 shows a diagnosis of moderate, mixed-type right ear hearing loss, and severe mixed-type left ear hearing loss, with absent acoustic reflexes bilaterally. It was noted that the veteran needed new hearing aids for both ears. A report of private audiometric examination in May 2001 again shows a diagnosis of moderate, mixed-type right ear hearing loss, and moderate to severe mixed-type left ear hearing loss. It was noted that the veteran opted to not undergo surgery for her hearing loss.

In February 2001, the Board remanded the veteran's claims for a VA examination to determine the nature and etiology of her right ear hearing loss, and the current severity of her left. ear hearing loss.

In a letter received in May 2001, the veteran's sister reported that the veteran has difficulty hearing even with the use of hearing aids. She served as the veteran's "ears" during phone calls, meetings, and court appearances. Hearing aids provided the veteran some hearing ability, but she still relied on lip reading. The sister re-

ported that she herself had perfect hearing, as did their four siblings.

On VA audiological evaluation in July 2001, the veteran again expressed that she sustained acoustic trauma in service due to noise exposure from aircraft engines. She stated that she had to watch faces to understand speech, and had difficulty speaking on the phone. Audiometry revealed that puretone thresholds, in decibels, were:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	50	45	45	45	40
LEFT	70	65	65	80	85

Speech audiometry revealed speech discrimination ability of 92 percent correct in the right ear and 74 percent correct in the left ear. The average puretone thresholds for the 1000, 2000, 3000, and 4000 Hertz frequencies were 44 decibels in the right ear and 73 decibels in the left ear. The diagnosis was mild to moderate mixed-type hearing loss in the right ear, and moderately-severe mixed-type hearing loss in the left ear. The examiner reported that the overall audiometric pattern was consistent with middle ear pathology, "i.e., ossicular fixation, . . . and suggestive of otosclerosis, bilaterally."

On VA audiological evaluation in August 2002, audiometry revealed that puretone thresholds, in decibels, were:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	55	50	45	45	35
LEFT	65	65	60	75	85

Speech audiometry revealed speech discrimination ability of 92 percent correct in the right ear and 74 percent correct in the left ear. The average pure tone thresholds for the 1000, 2000, 3000, and 4000 Hertz frequencies were 44 decibels in the right ear and 71 decibels in the left ear. The examiner noted that the VA audiological examination in July 2001 had revealed mild to moderate right ear hearing loss, and moderately-severe to severe hearing loss in the left ear. The examiner opined that the results of VA audiological examination in July 2001 were most consistent with bilateral ossicular fixation and suggestive of otosclerosis. It was noted that "[r]esults obtained today indicated essentially no change in hearing levels and speech recognition scores as reported on [the July 2001] examination."

Legal Criteria and Analysis—Service Connection

Service connection may be granted for disease or injury incurred in or aggravated 'by active military service. 38 U.S.C.A. *§* 1110, 1131; 38 C.F.R. §§ 3.303, 3.304. Service connection may also be granted. for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. *§* 3.303. A disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. 38 C.F.R. *§* 3.310(a).

In order to prevail on the issue of service connection, there must be medical evidence of a current disability; medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury. *See Hickon* v. *West,* 12 Vet. App. 247 (1999).

In the case of any veteran who served on active duty for ninety days or more and a chronic disease, to include sensorineural hearing loss (an organic disease of the nervous system), becomes manifest to a degree of ten percent or more within one year from the date of separation from such service, such disease shall be presumed to have been incurred in or aggravated by service notwithstanding that there is no record of evidence of such disease during the period of service. 38 U.S.C.A. §§ 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309.

For purposes of applying the laws administered by VA, impaired hearing will be considered to be a disability when the auditory thresholds in any of the frequencies 500, 1,000, 2,000, 3,000, or 4,000 Hertz is 40 decibels or greater; or when the, auditory threshold for at least three of the frequencies, 500, 1,000, 2,000, 3,000, or 4,000 are 26 decibels or greater; or when speech recognition scores using the Maryland CNC Test are less than 94 percent. 38 C.F.R. § 3.385 (2002).

When entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination, and a claimant, without good cause, fails to report for such examination, or reexamination, (1) in an, original compensation c1aim; the claim shall be rated based on the evidence of record;

(2) in any other original claim, a reopened claim for a benefit which was previously disallowed, or a claim for increase, the claim shall be denied. 38 C.F.R. § 3.655 (2002). In this case, the appeal of the service connection issue is from a decision on an original claim. Hence, the Board has no alternative but to base the decision of that issue on the evidence of record. 38 C.F.R. § 3.655.

When there is an approximate balance of positive and negative evidence regarding the merits of an issue materials to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. 38 U.S.C.A. § 5107(b).

A right ear hearing loss disability was not manifested in service; sensorineural hearing loss was not manifested to a compensable degree in the first postservice year; and there is no competent evidence that relates the veteran's right ear hearing loss to service or to any noise exposure therein. Accordingly, direct service connection for right hearing loss (or on a presumptive basis) is not warranted.

The veteran's theory of entitlement to service connection for right ear hearing loss disability is essentially that such disability is secondary to her service-connected left ear hearing loss. However, there is no competent evidence of such linkage. VA physicians have not found that there is such a relationship, and the veteran has not submitted any competent (medical) evidence to that effect (or indicated that any such evidence exits). Furthermore, she has not cooperated with further VA assistance efforts; she has failed to report for VA examination scheduled to ascertain the etiology of the right ear hearing loss.

Without competent evidence of a nexus between the current right ear hearing loss and service or between right ear hearing loss disability and the service-connected left ear hearing loss, service connection for right ear hearing loss is not warranted. *See Hickson*, 12 Vet. App. at 253. The Board has reviewed the veteran's contentions, and those of her sister. Their statements to the effect that her right ear hearing loss is related to acoustic trauma in service or to her service-connected left ear hearing loss cannot by themselves establish that this is so. They are lay persons and, as such, are not competent in matters requiring specialized medical knowledge, skill, training, or education. *Espiritu v. Derwinski,* 2 Vet. App. 492 (1992).

The doctrine of resolving reasonable doubt in the veteran's favor does not apply in this case as the preponderance of the evidence is against her claim of service connection for right ear hearing loss.

Legal Criteria and Analysis—Increased Rating

Disability ratings are determined by application of a schedule of ratings, based on average impairment of earning capacity. Separate diagnostic codes identify the various disabilities. 38 U.S.C.A. § 1155; 38 C.F.R., Part 4. In regard to any request for an increased schedular evaluation, the Board will only consider the factors enumerated in the applicable rating criteria. *Massey v. Brown*, 7 Vet. App. 204 (1994).

In a claim for an increased rating, the present level of disability is of primary concern; the regulations do not give past medical reports precedence over current findings. *Francisco v. Brown*, 7 Vet. App. 55 (1994). Where there is a question as to which of two evaluations apply,

the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. *§* 4.7.

If impaired hearing is service-connected in only one ear, as in this case, in order to determine the percentage evaluation from Table VII, the nonservice-connected ear will be assigned to Roman Numeral designation for impairment of I, subject to the provisions of 38 C.F.R. § 3.383 (2002).

When findings on audiometric studies (most notably on VA examinations in July 2001 and August 2002) are compared to Table VI of the rating schedule, the results are that the veteran has no worse than Level VI hearing in the left. Under 38 C.F.R. § 4.85, Table VII, Code 6100, such hearing acuity warrants a noncompensable rating (a compensable (10 percent) rating for a unilateral service connected hearing loss requires Level X or XI hearing acuity). An exceptional pattern of hearing (as specified in 38 C.F.R. § 4.86), which would permit rating under alternate criteria, is not shown. Consequently, the schedular criteria do not allow for a compensable rating in this case. The matter of an extraschedular rating under 38 C.F.R. § 3.321 has not been raised specifically. The Board's review of the evidence did not disclose any evidence of factors such as frequent hospitalizations or marked interference of employment due to the left ear hearing loss disability which would raise the matter of an extraschedular rating.

As noted above, rating hearing loss disability requires a mechanical application of audiometry findings to the schedular criteria, which here results in a noncompen-

sable rating. See *Lendenmann v. Principi*, 3 Vet. App. 345 (1992). Accordingly, the claim of entitlement to a compensable rating for left ear hearing loss must be denied.

ORDER

Service connection for right ear hearing loss is denied.

A compensable rating for left ear hearing gloss is denied.

/s/ GEORGE R. SENYK
GEORGE R. SENYK
Veterans Law Judge, Board of
Veterans' Appeals

APPENDIX I

1. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 38 U.S.C. 5103 (2000 & Supp. V 2005) provides in pertinent part:

Notice to claimants of required information and evidence

(a) REQUIRED INFORMATION AND EVIDENCE.—Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

3. 38 U.S.C. 7261 (2000 & Supp. V 2005) provides in pertinent part:

Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

> (1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.