

The Rule of Prejudicial Error and 38 U.S.C. § 5103(a): What Led to the United States Supreme Court Decision in *Shinseki v. Sanders* and the Need for a Clear Standard of Prejudice

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INTRODUCTION

In April 2009, the U.S. Supreme Court (Court) issued *Shinseki v. Sanders* (*Shinseki*),² deciding one aspect of prejudicial error analysis in the law governing adjudication of claims of the nation's veterans and their families for compensation benefits administered by the U.S. Department of Veterans Affairs (VA).³ Prior to this case, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) placed the burden on VA to show that an error in meeting the notice requirements of the Veterans Claims Assistance Act of 2000 (VCAA), codified at 38 U.S.C. § 5103(a),⁴ was not prejudicial to the claimant and thus did not require that the Board of Veterans' Appeals ("Board") decision be disturbed.⁵ The Court recognized that this imposed unreasonable evidentiary burdens on the government and too often required the U.S. Court of Appeals for Veterans Claims (CAVC) to vacate and remand decisions of the Board for errors that were in fact harmless, thus draining government resources that could have been expended serving those veterans and their families awaiting resolution of their claims and appeals.⁶ The Court indicated that it was deciding only the burden allocation, and not deciding what constituted a harmful § 5103(a) error.⁷ This article proposes a standard, or test, for determining whether an

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² 129 S. Ct. 1696 (2009).

³ *Id.* at 1704-05.

⁴ 38 U.S.C. § 5103(a) (2006).

⁵ *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), *rev'd sub nom.* *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009).

⁶ *See Shinseki*, 129 S. Ct. at 1705.

⁷ *Id.* at 1706-07.

error in the notice required by § 5103(a) is prejudicial to the appellant seeking review before the CAVC. Additionally, this article explains why, once a standard is chosen, consistent phrasing of the standard will go far in avoiding pitfalls inherent in this area of law.

Part I outlines the relevant development of the rule of prejudicial error, or as it is more generally referred to, the law of harmless error. Part II explains the VA compensation benefits process. Part III discusses the development of harmless error analysis as applied to § 5103(a) errors.⁸ Finally, Part IV addresses developing a standard for determining if a § 5103(a) error is prejudicial to a claimant, and the pitfalls to avoid in formulating and discussing a prejudicial-error standard, and concludes with a recommendation for a standard.

I. DEVELOPMENT OF THE LAW OF HARMLESS ERROR

It is not surprising that application of harmless error to a narrow area of veterans benefits law became problematic. It has not found easy application elsewhere. Harmless error was first codified less than 100 years ago.⁹ In modern times, the origins of the idea that not all errors in legal adjudications matter is found in the English Court of the Exchequer in the mid 19th century.¹⁰ In the United States, harmless error law took firm root in 1919 when Congress amended § 269 of the Judicial Code, the section that empowered the courts to set aside verdicts and grant new trials.¹¹ The purpose of the amendment was to instruct the courts to disregard those trial errors that had not affected the substantial rights of the parties.¹² In addressing that proposed

⁸ The regulation that implements 38 U.S.C. § 5103(a) is 38 C.F.R. § 3.159(b) (2008). Unless specifically stated, references in this article to § 5103(a) include the implementing regulation.

⁹ H.R. REP. NO. 65-913, at 1 (1919) (Conf. Rep.); *see also* *Kotteakos v. United States*, 328 U.S. 750, 757-59 (1946) (discussing the adoption of the Act of February 26, 1919, which later became known as the “harmless error statute” codified at 28 U.S.C. § 391).

¹⁰ Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 147 (1927); *see* ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 3-4 (1970) (discussing the early development of harmless error analysis).

¹¹ Sunderland, *supra* note 10, at 147.

¹² H.R. REP. NO. 65-913, at 1.

legislation, a congressional committee provided that “[t]he proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant’s substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation rest upon the one who claims under it.”¹³ Today, the Judiciary Code, the Federal Rules of Criminal Procedure, and the Federal Rules of Civil Procedure include harmless error provisions.¹⁴

In the 1943 diversity jurisdiction case of *Palmer v. Hoffman*,¹⁵ the Court analyzed whether an action of the trial judge, if erroneous, required reversal.¹⁶ Judgment was for the plaintiff in a personal injury action against a railroad, and the appellate court affirmed the judgment.¹⁷ The petitioners sought reversal based in part on an evidentiary ruling of the trial judge.¹⁸ At trial, a witness for the respondent had testified that he had given a signed document to one of the respondent’s attorneys.¹⁹ Counsel for the petitioners asked to inspect the document, and the trial judge told the petitioners that if counsel inspected the document the judge would admit it into evidence if requested to do so by the respondent.²⁰ As the petitioners’ counsel then declined to inspect the document, the document was not marked for identification, admitted into evidence, and made part of the record before the Court.²¹

¹³ *Id.*

¹⁴ See 28 U.S.C. § 2111 (2006) (“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”); FED. R. CRIM. P. 52(a) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”); FED. R. CIV. P. 61 (“Unless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.”).

¹⁵ 318 U.S. 109 (1943).

¹⁶ *Id.* at 116.

¹⁷ *Id.* at 109.

¹⁸ *Id.* at 116.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

In ruling on this matter, the Court found it unnecessary to decide whether the trial judge's ruling was error, determining that even if the ruling was erroneous it could not have been prejudicial to the petitioners, and thus the verdict need not be disturbed.²² Explaining this determination, the Court stated as follows:

Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous.²³

Explicitly allocating the burden, the Court stated, "He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners."²⁴

Palmer, being one of the few key cases addressing harmless error in a civil rather than a criminal proceeding, underpinned the Court's holding in *Shinseki*.²⁵ The logic in *Palmer*, that without knowing the contents of the complained of evidence the Court could not find the error harmful, was echoed by the CAVC in the 2004 case of *Pelegriani v. Principi*,²⁶ although applied with the burden on VA, the party seeking to uphold the judgment below, rather than on the appellant, the party seeking to undo the judgment below.²⁷

Kotteakos v. United States,²⁸ decided in 1946, was to become arguably the most important case in the area of harmless error. This case expounded on the analysis that an appellate court must apply to determine

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009).

²⁶ 18 Vet. App. 112 (2004).

²⁷ *See id.* at 121.

²⁸ 328 U.S. 750 (1946).

if a trial error had harmed the defendant, and revealed many of the issues in harmless error analysis that are present to this day.²⁹ *Kotteakos* is worth discussion because the Court, the Federal Circuit, and the CAVC placed reliance on this case more than on any other precedent to inform the law of harmless error as applied to § 5103(a) notice errors.³⁰

As framed by the Court, the question in *Kotteakos* was whether the appellants had suffered substantial prejudice from criminal convictions resulting from a trial that included improperly admitted evidence.³¹ The Court considered the error under the amended version of § 269 of the Judicial Code.³² Explaining the need for harmless error review, the Court referred to the comments of a trial judge shortly after enactment of § 269 that “courts of review, ‘tower above the trials of criminal cases as impregnable citadels of technicality.’”³³ Providing guidance for that review, the Court explained that determining whether an error had hurtfully affected the substantial rights of a party depended on the type of proceeding, what was at stake in the outcome, and the relationship of the error to the case as a whole as to its effect on the judgment.³⁴

Acknowledging that the harmless error statute did not distinguish between civil and criminal cases, the Court reasoned that the high stakes in criminal proceedings, life or liberty, as compared to civil liability, dictated that the same criteria did not necessarily apply to both types of cases.³⁵ Analysis of the effect of the error had to take into account the effect that the error had or reasonably may have had on the fact finder’s decision, not how the appellate court may have decided the case.³⁶ If the reviewing court

²⁹ *See id.* at 757-77.

³⁰ *E.g., Shinseki*, 129 S. Ct. at 1705-07; *Sanders v. Nicholson*, 487 F.3d 881, 887-89 (Fed. Cir. 2007); *Mayfield v. Nicholson*, 19 Vet. App. 103, 113, 117-19, 121, 129-30 (2005).

³¹ *Kotteakos*, 328 U.S. at 767-77.

³² *Id.* at 759.

³³ *Id.* (quoting Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925)).

³⁴ *Id.* at 762.

³⁵ *Id.* at 762-63.

³⁶ *Id.* at 764.

was left in “grave doubt” as to whether the error had a substantial influence on the judgment, the criminal conviction should be undone.³⁷ This placed the burden on the government, the party seeking to uphold the judgment, to show that the error was harmless.

Kotteakos has been mined many times over for its language. Again explaining why the rule of harmless error had been instituted, the Court stated:

The general object was simple, to substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.³⁸

Almost 50 years after *Kotteakos*, the Court’s reference to “essential unfairness in trials” received new life in the CAVC’s discussion of prejudicial error analysis applied to § 5103(a), albeit referred to in the positive as “essential fairness of the adjudication.”³⁹

When *Kotteakos* was decided, the view of what could constitute harmless error was still undeveloped. Indeed, the Court stated that if a court was sure that the error did not affect the jury then the judgment should stand except perhaps where the error was a “departure . . . from a constitutional norm.”⁴⁰ The view that errors involving rights guaranteed by the U.S. Constitution could never be deemed harmless held for almost twenty years. That this was not necessarily the case was brought up in *Fahy v. Connecticut*,⁴¹ in which the Court found the error to not be harmless; i.e., the error was prejudicial because there was a

³⁷ *Id.* at 765.

³⁸ *Id.* at 759-60.

³⁹ *Mayfield v. Nicholson*, 19 Vet. App. 103, 113-15 (2005).

⁴⁰ *Kotteakos*, 328 U.S. at 764-65.

⁴¹ 375 U.S. 85 (1963).

reasonable possibility that unconstitutionally obtained evidence might have contributed to a state court conviction.⁴²

In the 1967 case of *Chapman v. California*,⁴³ the Court made clear that constitutional trial errors were subject to harmless error analysis.⁴⁴ In analyzing a trial violation of the criminal defendant's right against self-incrimination, the Court determined that the state had failed to demonstrate beyond a reasonable doubt that the error was harmless.⁴⁵ The *Chapman* Court considered the state of California's treatment of trial errors as harmless unless the error resulted in a "miscarriage of justice."⁴⁶ While not invalidating the California rule, the Court stated that it preferred the approach of the earlier case of *Fahy*.⁴⁷ Of interest, the *Chapman* Court saw little, if any, difference between the *Fahy* standard for harmless error, that there was no reasonable possibility that the unconstitutionally obtained evidence might have contributed to the conviction, and a standard that to uphold the judgment the error must be found harmless beyond a reasonable doubt.⁴⁸

The Court's attention to the language used to define the standard of harmless error (or prejudice) in both positive terms (whether there was a reasonable possibility that the evidence contributed to the conviction) and negative terms (whether the error was harmless beyond a reasonable doubt) is of some interest. As will be explained in another section of this article, failure to carefully choose wording in analyzing whether an error was prejudicial can create unintended consequences.⁴⁹

Chapman seemed to have settled the matter; in criminal trials errors involving constitutionally guaranteed rights could be found to be harmless, and the standard for finding the error

⁴² *Id.* at 86-87, 91-92.

⁴³ 386 U.S. 18 (1967).

⁴⁴ *Id.* at 21-22.

⁴⁵ *Id.* at 26.

⁴⁶ *Id.* at 23.

⁴⁷ *Id.*

⁴⁸ *Id.* at 24.

⁴⁹ See *infra* notes 283 – 314 and accompanying text.

harmless was that it was harmless beyond a reasonable doubt. However, two other Supreme Court cases would complicate the matter. In *Brecht v. Abrahamson*,⁵⁰ the Court applied harmless error analysis to a proceeding for a writ of habeas corpus where the trial error was a violation of the defendant's Fifth Amendment right against self-incrimination.⁵¹ Although the Court found that the error did not influence the jury's verdict, and was therefore harmless, the Court appeared to place the burden on the habeas petitioner to show prejudice from the error.⁵² Shortly after *Brecht*, however, the Court issued *O'Neal v. McAninch*,⁵³ which also reviewed a civil proceeding for the writ of habeas corpus involving constitutional trial error.⁵⁴ The Court determined that although a civil proceeding rather than a criminal proceeding was the source of the appeal, the underlying stake of imprisonment was a criminal law type stake, and in a close case, the writ must not be denied; thus effectively placing the burden on the state to show that the error was harmless.⁵⁵ Although the Court in *Shinseki* did not refer to habeas cases, the Court rooted its finding in the distinction between criminal law type stakes and typical civil law type stakes.⁵⁶

Certain errors have been deemed not subject to harmless error analysis; these errors always require reversal. The Court described those errors in *Arizona v. Fulminante*⁵⁷ as errors going to the very structure of the trial.⁵⁸ Such errors include where the trial judge was biased, members of the criminal defendant's race were excluded from the jury, the criminal defendant was denied a public trial, or the criminal defendant was denied the right to counsel at trial.⁵⁹

⁵⁰ 507 U.S. 619 (1993).

⁵¹ *Id.* at 622-23.

⁵² *Id.* at 637.

⁵³ 513 U.S. 432 (1995).

⁵⁴ *Id.*

⁵⁵ *Id.* at 435-37, 440.

⁵⁶ *Shinseki v. Sanders*, 129 S. Ct. 1696, 1706 (2009).

⁵⁷ 499 U.S. 279 (1991).

⁵⁸ *Id.* at 309-10.

⁵⁹ *Id.*

Returning to determining whether prejudice resulted from an error in a civil proceeding, the Court kept the language of *Kotteakos* alive in *McDonough Power Equipment, Inc. v. Greenwood*⁶⁰ in its summary that harmless error rules “embody the principle that courts should exercise judgment in preference to the automatic reversal for ‘error’ and ignore errors that do not affect the essential fairness of the trial.”⁶¹ *McDonough* concerned a products liability action in which the plaintiff had lost at trial and the appellate court had reversed based on the asserted error that a juror did not respond to a question on *voir dire* as to whether the juror or an immediate family member had ever sustained a severe injury.⁶² The respondent argued that since the juror’s son had previously suffered a broken leg as the result of an exploding tire, the juror’s failure to respond indicated bias, requiring reversal.⁶³ The Court stated that the “motives for concealing information may vary, but only those reasons that affect a juror’s impartiality can truly be said to affect the fairness of a trial.”⁶⁴ In the context of this case, reference to the essential fairness of a proceeding was directly related to the type of harm alleged, an impartial trier of fact.⁶⁵ The Court’s reference to the essential fairness of the proceeding was later to become a defining term in the CAVC’s analysis of prejudicial error as applied to § 5103(a) notice errors.⁶⁶

As to administrative agency determinations, 5 U.S.C. § 706, codifying in part the Administrative Procedure Act (APA), provides that in deciding matters arising from administrative agency actions, a “reviewing court shall . . . [take] due account . . . of the rule of prejudicial error.”⁶⁷ The Court has termed this statute as an administrative

⁶⁰ 464 U.S. 548 (1984).

⁶¹ *Id.* at 553 (citing *Kotteakos v. United States*, 328 U.S. 750, 759-60 (1946)).

⁶² *McDonough*, 464 U.S. at 550.

⁶³ *Id.* at 550-51.

⁶⁴ *Id.* at 556.

⁶⁵ *Id.* at 548.

⁶⁶ *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005).

⁶⁷ 5 U.S.C. § 706 (2006).

law harmless error rule.⁶⁸ Similarly, the statute defining the scope of review of the CAVC provides that in deciding matters before it the CAVC “shall . . . take due account of the rule of prejudicial error.”⁶⁹

II. VETERANS COMPENSATION BENEFITS PROCESS

In general, veterans are entitled to compensation benefits for disease and injuries incurred in or aggravated in active military, naval, or air service.⁷⁰ The Secretary of Veterans Affairs administers these benefits.⁷¹ Claims for VA benefits are initially reviewed by an agency of original jurisdiction (AOJ), which in most cases is a VA regional office (RO).⁷² If the RO denies a claim, the claimant may appeal that decision to the Board.⁷³ The Board then conducts a *de novo* review of the case.⁷⁴ If the Board denies the appeal, the claimant can appeal that Board decision to the CAVC.⁷⁵ The CAVC is an Article I court.⁷⁶ Decisions by the CAVC are reviewable by an Article III court,⁷⁷ the Federal Circuit.⁷⁸ Those decisions are reviewable by the U.S. Supreme Court.⁷⁹

Section 7261(b)(2) of Title 38 of the U.S. Code provides that in making its determinations regarding Board decisions, the CAVC “shall . . . take due account of the rule of prejudicial error.”⁸⁰ From its

⁶⁸ Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 659-60 (2007) (citing PDK Labs., Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 799 (D.C. Cir. 2004).

⁶⁹ 38 U.S.C. § 7261(b)(2).

⁷⁰ *Id.* § 1110.

⁷¹ *Id.* § 511.

⁷² Shinseki v. Sanders, 129 S. Ct. 1696, 1701 (2009).

⁷³ 38 U.S.C. § 7104.

⁷⁴ *Id.*

⁷⁵ *Id.* § 7252.

⁷⁶ *Id.* § 7251.

⁷⁷ U.S. CONST. art. III, § 1.

⁷⁸ 38 U.S.C. § 7292.

⁷⁹ 28 U.S.C. § 1254.

⁸⁰ 38 U.S.C. § 7261.

inception, the CAVC had conducted prejudicial error review.⁸¹ In November 2000, Congress enacted the VCAA which assigned to VA a duty, later codified at 38 U.S.C. § 5103(a), to provide certain notice to claimants early in the claims process.⁸² This gave rise to a new application of § 7261(b)(2). Before going into the particulars of § 5103(a) notice requirements and the process of determining if a notice error was prejudicial to the appellant, a detailed explanation of the VA claims process is in order. This will familiarize the reader with the terms of art and procedural aspects unique to this area of law and thereby facilitate understanding the key cases that led to *Shinseki*.

A. The Claim and Appeal Process

In a claim to establish that benefits are warranted for a disability, what is referred to as a “service connection” claim, the evidence must show that the claimant has the claimed disability, that there was some event, disease, or injury that the claimant suffered during active service, and that there is a link or a “nexus” between the current disability and that in-service disease, event, or injury.⁸³ Benefits are also available in some instances for dependents of the veteran, the most common being dependency and indemnity compensation (DIC) benefits to which a surviving spouse is entitled if the veteran died from a disease or injury that was connected to service.⁸⁴ Another common type of claim is a request for an increase in compensation for a disability for which service connection has been established, but which the claimant asserts has worsened since the level of compensation was previously determined.⁸⁵

⁸¹ See *Soyini v. Derwinski*, 1 Vet. App. 540, 546 (1991) (stating that the Board’s failure to comply with the requirement that it provide reasons and bases for its decision did not require strict adherence in the face of overwhelming evidence supporting the Board’s decision in that case).

⁸² Pub. L. No. 106-475, 114 Stat. 2096 (2000); 38 U.S.C. § 5103; 38 C.F.R. § 3.159(b) (2008).

⁸³ *Hickson v. West*, 12 Vet. App. 247, 252-53 (1999); 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303.

⁸⁴ 38 U.S.C. § 1310 (2006).

⁸⁵ *E.g.*, *Hart v. Mansfield*, 21 Vet. App. 505 (2007).

The claim process typically begins with the claimant filing a request for benefits. Initially, this is satisfied without any formal requirements.⁸⁶ Once VA receives a claim for benefits from that claimant, the claimant will be required to file a formal application for benefits, which amounts to filling in a form.⁸⁷ After the claim has been filed, § 5103(a) requires that VA tell the claimant what evidence is needed to substantiate the claim and VA's and the claimant's respective duties in obtaining evidence to substantiate the claim.⁸⁸

Once the RO reaches a decision, it must provide the claimant and the claimant's representative, if any, with notice of the decision.⁸⁹ This notice must clearly set out the reasons for the decision, and the claimant's right to a hearing, the right to representation, and the right, procedure, and time limit, for initiating an appeal.⁹⁰ If the RO has not granted the benefits sought in full and the claimant disagrees with that decision, the claimant can initiate an appeal to the Board by submitting a "notice of disagreement."⁹¹ This notice of disagreement needs to be a written communication from either the claimant or his or her representative, but no special wording is required; it only must be capable of being reasonably construed as expressing disagreement with the determination and evidence an intent for appellate review.⁹² One year from the date of mailing of the decision is allotted for the claimant to submit the notice of disagreement.⁹³

Receipt of a notice of disagreement triggers a two-tiered duty on VA's part. First, the RO must take such development or review action it deems proper under the provisions of applicable regulations.⁹⁴ Such development or action can resolve the disagreement either by

⁸⁶ 38 C.F.R. § 3.155.

⁸⁷ *Id.* § 3.151.

⁸⁸ 38 U.S.C. § 5103(a).

⁸⁹ 38 C.F.R. § 3.103.

⁹⁰ *Id.* § 3.103(b)(1).

⁹¹ 38 U.S.C. § 7105(a).

⁹² 38 C.F.R. § 20.201.

⁹³ 38 U.S.C. § 7105(b)(1).

⁹⁴ *Id.* § 7105(d)(1).

the RO granting the claim or the claimant withdrawing the notice of disagreement.⁹⁵ During this process, the claimant has a right to elect review of the decision by a Decision Review Officer or a Veterans Service Center Manager.⁹⁶ That reviewer can conduct additional development, including obtaining more evidence, holding an informal conference, and holding a formal hearing.⁹⁷ Unlike a typical civil proceeding, although a decision has already been rendered, the reviewer may grant the claim.⁹⁸ A decision pursuant to this review must include a summary of evidence considered, a citation to pertinent laws and discussion of how those laws affect the decision, and reasons for the decision.⁹⁹

If the action of the RO after receiving the notice of disagreement does not resolve the disagreement, the RO must then issue a document referred to as a “statement of the case.”¹⁰⁰ A statement of the case must include a summary of the evidence pertinent to the issues disagreed with, citation to pertinent laws and regulations, and a discussion of how those laws and regulations affect the decision.¹⁰¹ The appellant then has the later of 60 days after issuance of the statement of the case or within one year after the RO’s mailing of the decision during which to perfect the appeal to the Board by filing a formal appeal.¹⁰² This amounts to completing and submitting a VA Form 9 (Appeal to Board of Veterans’ Appeals), or correspondence containing the information required in the form.¹⁰³ The appellant can also request a hearing before a member of the Board.¹⁰⁴ So long as a statement of the case complies with all applicable due process and notification requirements, the statement of the case constitutes a “readjudication” decision.¹⁰⁵

⁹⁵ *Id.*

⁹⁶ 38 C.F.R. § 3.2600(a).

⁹⁷ *Id.* § 3.2600(c).

⁹⁸ *Id.* § 3.2600(d).

⁹⁹ *Id.*

¹⁰⁰ 38 U.S.C. § 7105(d)(1).

¹⁰¹ *Id.*

¹⁰² *Id.* § 7105(d)(3); 38 C.F.R. §§ 19.32, 20.302(b).

¹⁰³ 38 C.F.R. § 20.202.

¹⁰⁴ *Id.* § 20.700.

¹⁰⁵ *Prickett v. Nicholson*, 20 Vet. App. 370, 377-78 (2006).

During this process, and indeed, until the Board decides the appeal, the record remains open and the appellant can continue to submit evidence to support the claim.¹⁰⁶ If evidence submitted by the appellant or obtained by VA at any point in this process balances the scales so that the elements of the claim are met, the RO can grant the benefit sought.¹⁰⁷ At any point prior to when the appeal is certified to the Board, the appellant can add pertinent evidence to the record before the RO, and the RO must respond by issuing supplemental statements of the case that take into account that new evidence.¹⁰⁸ The CAVC has determined that so long as the supplemental statement of the case complies with the applicable due process and notification requirements for a decision, a Board finding that the supplemental statement of the case is a readjudication is not clearly erroneous.¹⁰⁹ As a result, unlike the typical civil, or for that matter criminal proceeding, the claimant does not have merely one chance for the claim to be granted prior to reaching the first level of appellate review. Indeed, the claim may be reviewed several times prior to reaching the Board.

At this point, it is likely that the appellant will have been provided with much more specific information as to what is lacking in the claim than would likely have been possible at the point where the RO initially received the claim.¹¹⁰ The statement of the case does not necessarily include the division of duties between the RO and the veteran as to obtaining evidence. There is, however, no prohibition against the RO including the citation to the regulation implementing the statutory requirement for notice under the VCAA, or for that matter, the text of the relevant regulation or statute. It is not rare for the RO to do so.¹¹¹

¹⁰⁶ *Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 327 F.3d 1339, 1353 (Fed. Cir. 2003); 38 C.F.R. § 20.1304(c) (2008).

¹⁰⁷ 38 C.F.R. § 3.2600(d).

¹⁰⁸ *Id.* § 19.31(b)(1).

¹⁰⁹ *Mayfield v. Nicholson*, 20 Vet. App. 537, 542 (2006).

¹¹⁰ *See Goodwin v. Peake*, 22 Vet. App. 128, 132 (2008) (noting that VA’s notice obligations that apply after a notice of disagreement is received are in many respects more detailed than those of § 5103(a)).

¹¹¹ *E.g., Horst v. Nicholson*, No. 05-3470, 2007 WL 2302399, at *1 (Vet. App. July 31, 2007);

Should the RO fail to consider the newly submitted evidence and certify the appeal to the Board, the Board is required to remand the matter back to the RO to consider the evidence and issue the proper document(s) unless the claimant waives such consideration.¹¹² This open record allows for the appellant to prove the claim at the RO level long after the initial unfavorable adjudication and after the appellant is told precisely what evidence is lacking that has resulted in the denial of the claim. While this certainly does not replace or do away with the notice requirements in the VCAA, it reduces the likelihood that the appellant will have been prejudiced by lack of § 5103(a) notice.

As a discussion of key cases that led to *Shinseki* will demonstrate, this process of the appellant submitting evidence and argument, VA adding evidence to the record, and VA issuing supplemental statements of the case and other documents can last for years. If the Board denies the appeal, the appellant then has 120 days to appeal that Board decision to the CAVC.¹¹³ Although the claims and appeal process at the agency level involves a non-adversarial relationship between the claimant and the agency, once the matter reaches the CAVC the relationship is adversarial.¹¹⁴

B. The VCAA

In addition to a description of the claim and appeal process, a brief history of the VCAA is important in understanding the development of prejudicial error analysis as applied to § 5103(a) errors and the standard recommended in this article for determining if such an error was prejudicial to the appellant.

Mountain v. Peake, No. 05-3461, 2008 WL 2129830, at *4 (Vet. App. Feb. 20, 2008); Lopez v. Peake, No. 06-2224, 2008 WL 4963346, at *2 (Vet. App. Mar. 18, 2008); Konicki v. Peake, No. 06-2099, 2008 WL 2511752, at *1 (Vet. App. June 23, 2008).

¹¹² 38 C.F.R. § 20.1304(c).

¹¹³ 38 U.S.C. § 7266 (2006).

¹¹⁴ Forshey v. Principi, 284 F.3d 1335, 1355 (Fed. Cir. 2002) (en banc) (“The veterans’ benefits system remains a non-adversarial system when cases are pending before the Veterans’ [sic] Administration. However, the Court of Appeals for Veterans Claims’ proceedings are not non-adversarial.”).

Prior to November 2000, 38 U.S.C. § 5107 required VA to assist claimants in the development of claims that were “well grounded.”¹¹⁵ A well-grounded claim was a claim that was plausible.¹¹⁶ Regulations in place at that time reflect VA’s practice of assisting claimants not only in the development of claims found to be well-grounded but also in the development of claims that had not yet achieved well-grounded status.¹¹⁷

In 1999 the CAVC noted, in *Morton v. West*,¹¹⁸ that § 5107 reflected a policy that implausible claims should not consume the limited resources of VA and thereby force greater delay in adjudicating claims which were plausible.¹¹⁹ Reading the text of § 5107 as including a condition precedent that a claimant present a plausible claim for VA to have a duty to assist the claimant, the CAVC held that absent satisfaction of that condition precedent, VA was not permitted to assist the claimant in the development of the claim.¹²⁰ The CAVC reasoned that the congressional intent was to not expend limited VA resources on claims that were not plausible and thus introduce

¹¹⁵ 38 U.S.C. § 5107(a) (1994). This section stated the following:

Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

Id.

¹¹⁶ *Grottveit v. Brown*, 5 Vet. App. 91, 92 (1993) (noting that “[t]he [VA] benefits system requires more than just an allegation; a claimant must submit supporting evidence . . . [and] the evidence must justify a belief by a fair and impartial individual that the claim is plausible” (quoting *Tirpak v. Derwinski*, 2 Vet. App. 609, 611 (1992))).

¹¹⁷ *See, e.g.*, 38 C.F.R. § 3.159 (2001) (providing that it was still the responsibility of the claimant to submit evidence to well ground a claim, and that, so long as information was of record sufficient to identify and locate necessary evidence and the claimant provided authorization for the release of records to VA, VA would assist the claimant in developing facts pertinent to the claim, including requesting service department records, records maintained by other Federal agencies, and records from State and local government agencies as well as privately maintained records); *Id.* § 3.103(a) (noting that it was VA’s obligation to assist a claimant in developing facts pertinent to the claim).

¹¹⁸ 12 Vet. App. 477 (1999).

¹¹⁹ *Id.* at 480.

¹²⁰ *Id.* at 486.

additional delay in adjudicating claims that were plausible.¹²¹ In conclusion, the CAVC stated that “Congress might well opt for requiring the Secretary to assist and examine all veterans, regardless of whether well-grounded claims have been submitted. But that balancing process is the responsibility of the legislative branch, not this Court.”¹²²

Congress enacted the VCAA in response to *Morton*. Of interest is that the notice requirement codified in § 5103(a), while certainly important, was somewhat incidental. The purpose of the VCAA was to put back in place the duty to assist the claimant prior to a showing that the claim was plausible, a practice that was well recognized as having been in place prior to *Morton*.¹²³ Also of interest is that the question in *Morton* was not whether the claimant knew what evidence and information was lacking in his claim.¹²⁴ VA had denied the claim for service connection for various disabilities because there was no nexus between the claimed disabilities and the veteran’s active service.¹²⁵ The appellant conceded that there may be no medical evidence linking the current disabilities to his active duty, but contended that VA nevertheless had a duty to assist him in developing the facts of his claim.¹²⁶

¹²¹ *Id.* at 480.

¹²² *Id.* at 486.

¹²³ See 146 CONG. REC. S9211, S9211-12 (daily ed. Sept. 25, 2000) (statement of Sen. Specter) (“[The *Morton* case] had the effect of barring [VA] from offering its assistance to veterans and other claimants in preparing and presenting their claims to VA prior to the veteran first accumulating sufficient evidence to show that his or her claim is ‘well grounded.’ This decision overturned a long history of VA practice under which VA had taken upon itself a duty to assist veterans in gathering evidence and otherwise preparing their claims for VA adjudication. That practice was grounded in a long VA tradition of non-adversarial practice in the administrative litigation of veterans’ claims.”).

¹²⁴ The Board denied the claims because the claims were not well-grounded, finding no evidence of a nexus between service and the claimed hearing loss and back disability, no evidence of a link between the claimant’s varicose veins and service, no evidence other than the claimant’s assertion that varicose veins were present during service, and no medical evidence to suggest that the claimed change in length of the right upper extremity was due to surgery for the claimant’s service connected tuberculosis. *Morton*, 12 Vet. App. at 479.

¹²⁵ *Id.*

¹²⁶ *Id.*

The text of the notice that *Morton* gave rise to and was at issue in *Shinseki* is as follows:

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.¹²⁷

One way to view these two sentences is that the first sentence contains one element, notice of the information or evidence necessary to substantiate the claim, and the second sentence contains a second element, notice of the claimant's duties in producing or obtaining evidence, and a third element, notice of VA's duties in obtaining evidence and information. This is the view chosen by the CAVC.¹²⁸ The regulation issued to implement § 5103(a), 38 C.F.R. § 3.159, included the requirement, not found in § 5103(a), that "VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim."¹²⁹ The CAVC later determined that this was a "fourth element" of notice.¹³⁰ In May 2008, VA amended this section to remove the last sentence, thus removing the fourth element of notice.¹³¹

III. HARMLESS ERROR AND SECTION 5103(a)

In its review of Board decisions, the CAVC is tasked by statute to "take due account of the rule of prejudicial error."¹³² Finding that

¹²⁷ 38 U.S.C. § 5103(a) (2006).

¹²⁸ *Mayfield v. Nicholson*, 19 Vet. App. 103, 122-25 (2005).

¹²⁹ 38 C.F.R. § 3.159(b)(1) (2007).

¹³⁰ *Mayfield*, 19 Vet. App. at 110.

¹³¹ 38 C.F.R. § 3.159(b)(1) (2008).

¹³² 38 U.S.C. § 7261(b)(2) (2006).

VA had erred in meeting its notice duties under the VCAA in the case of *Conway v. Principi*,¹³³ the CAVC vacated the Board decision and remanded the matter to the Board.¹³⁴ In so doing, the CAVC stated that “[w]hile the Court will not attempt in this case to address the application of the harmless error doctrine, the time may be approaching to do so.”¹³⁵ Pursuant to an appeal by the government, the Federal Circuit held that the CAVC’s duty to take due account of the rule of prejudicial error applied to errors in the notice required by the VCAA and was not optional.¹³⁶

A. Expansion of Errors

Not long after the Federal Circuit’s decision in *Conway*, the CAVC applied § 7261(b)(2) to a § 5103(a) error in the case of *Pelegriani v. Principi*.¹³⁷ In *Pelegriani*, the CAVC defined the timing aspect of VCAA notice, stating that the statutory language of “[u]pon receipt of” and the regulatory language of “[w]hen VA receives a complete or substantially complete application for benefits” meant that in order to comply with these provisions, VA must provide § 5103(a) content complying notice prior to the initial unfavorable adjudication of the claim by the AOJ.¹³⁸ Providing the notice, but failing to do so until after the initial unfavorable adjudication by the RO, would in general constitute another type of notice error, a timing error.¹³⁹

After determining that notice complying with the requirements of § 5103(a) had not been provided to the claimant, the CAVC turned to whether the lack of notice had prejudiced the claimant.¹⁴⁰ The CAVC concluded that “based upon the record and pleadings, [the CAVC]

¹³³ No. 01-107, 2002 WL 31941494 (Vet. App. Nov. 20, 2002), *vacated*, 353 F.3d 1369 (Fed. Cir. 2004).

¹³⁴ *Id.* at *3.

¹³⁵ *Id.* at *2.

¹³⁶ *Conway*, 353 F.3d at 1374.

¹³⁷ 18 Vet. App. 112 (2004).

¹³⁸ *Id.* at 119-20.

¹³⁹ *See id.* at 120 (recognizing that since the initial adjudication of the claim occurred prior to enactment of the VCAA, VA could not have erred by failing to meet the timing requirement).

¹⁴⁰ *Id.* at 121.

cannot intuit that there is no possible information or evidence that could be obtained to substantiate the appellant's service-connection claim."¹⁴¹ The CAVC referred to earlier decisions for support, and then stated that "it would require pure speculation for the Court to determine at this time that, once given the notice to which he is entitled, the appellant definitely could not provide or lead VA to obtain the information or evidence necessary to substantiate his service-connection claim."¹⁴² This echoed the Supreme Court's statement in *Palmer*, but while the Court in *Palmer* had placed the burden on the party seeking to undo the judgment below, and therefore finding the error harmless, in *Pelegri*, the CAVC effectively found the error prejudicial, implicitly placing the burden on VA to show harmlessness of a § 5103(a) notice error.

B. CAVC Framework for Prejudicial Error Analysis

Although the CAVC's analysis in *Pelegri* left little doubt that VA had the burden of showing harmlessness of a § 5103(a) error in a typical service connection claim, this was not explicitly stated. Also not well defined by *Pelegri* and earlier cases was what exactly that "harm" was, or to phrase it in the language of harmless error, how a § 5103(a) error could have affected the appellant's substantial rights.

The seminal case in VA law regarding harmless error analysis is the 2005 case of *Mayfield v. Nicholson (Mayfield I)*.¹⁴³ Apart from the fact that this case is significant in establishing the meaning of key terms in harmless error analysis as applied to § 5103(a) notice errors, the *Mayfield* case from the CAVC Order in April 2005 through the Federal Circuit decision (*Mayfield II*), reversing the CAVC, illustrates how § 5103(a) notice became overly technical.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 19 Vet. App. 103 (2005). For consistency with published decisions, this article treats *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005) as *Mayfield I* and *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006) as *Mayfield II*, rather than assign numbers to each of the six decisions or orders that have been issued.

Of interest as to the consumption of government resources, the *Mayfield* case involved a total of six court decisions or orders and many more reviews of the evidence by the RO and the Board. The end result was no different than the initial decision by the RO. In September 2007, the Federal Circuit upheld the CAVC decision, which had affirmed the Board decision, which had affirmed the RO decision.¹⁴⁴

i. *Mayfield Prior to Appeal to the CAVC*

Mr. Mayfield served as a truck driver in the Army from 1942 to 1946.¹⁴⁵ In 1980 he sought VA compensation benefits for a left leg injury and varicose veins of both legs.¹⁴⁶ VA awarded benefits for both conditions.¹⁴⁷ Mr. Mayfield died from congestive heart failure due to coronary artery disease in October 1999.¹⁴⁸ The following month, Mr. Mayfield's surviving spouse filed a claim for VA dependency and indemnity benefits asserting that Mr. Mayfield's varicose veins prevented proper treatment for his coronary artery disease.¹⁴⁹ The RO denied her claim in December 1999, determining that the claim was not well-grounded because the evidence failed to show a relationship between Mr. Mayfield's service and the heart disease which resulted in his death.¹⁵⁰ Mrs. Mayfield initiated an appeal of that decision and the RO issued a statement of the case in June 2000 explaining that her claim was denied because there was no evidence showing a link between Mr. Mayfield's death and his varicose veins.¹⁵¹ She perfected her appeal to the Board and provided testimony at a hearing before a Veterans Law Judge.¹⁵² In December 2000, the Board remanded the claim to the RO in light of the newly enacted VCAA.¹⁵³

¹⁴⁴ *Mayfield v. Nicholson*, 499 F.3d 1317 (Fed. Cir. 2007).

¹⁴⁵ *Mayfield v. Principi*, No. 02-1077, 2004 WL 772121, at *1 (Vet. App. Mar. 23, 2004).

¹⁴⁶ *Mayfield I*, 19 Vet. App. at 107.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

Pursuant to the Board's remand, the RO sent a letter to Mrs. Mayfield in December 2000 asking her to "identify all VA and non-VA health care providers who ha[d] treated the veteran subsequent to service, and particularly any medical treatment rendered to the veteran immediately preceding his death."¹⁵⁴ Mrs. Mayfield responded by authorizing Mr. Mayfield's treating physicians to release all medical evidence to VA and specifically indicating that she needed evidence which would help establish that Mr. Mayfield could not undergo the proper treatment for his heart condition due to his varicosities.¹⁵⁵ In March 2001, the RO sent a letter to Mrs. Mayfield informing her of VA's duty to notify and assist her in obtaining evidence or information as provided by the VCAA.¹⁵⁶

The RO obtained treatment records identified by Mrs. Mayfield and submitted Mr. Mayfield's medical history to a VA physician for a medical opinion as to whether the Veteran's varicosities contributed to his death.¹⁵⁷ In response, the physician opined that it was less likely than not that the Veteran's varicose veins had any impact on his coronary artery disease which had resulted in his death.¹⁵⁸ Following this development, the RO issued a supplemental statement of the case in January 2002 again denying Mrs. Mayfield's claim because no evidence indicated that Mr. Mayfield's heart problems were related to his military service

¹⁵⁴ *Id.* (internal quotation marks omitted).

¹⁵⁵ *Id.* at 107-08.

¹⁵⁶ *Id.* at 108.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* The physician stated as follows:

Mr. Mayfield had several cardiac risk factors for [CAD] including long []standing hypertension and diabetes He had [a] successful two [-]vessel Coronary artery bypass-[s]urgery in 1990 His left ventricular systolic function and renal function slowly deteriorated and he died of severe congestive heart failure and renal failure. I did not see any notes by cardiac surgeons stating the inability of bypasses due to varicosit[ies] of his leg veins. He needed only two vessels by-pass[ed], which was appropriately done." *Id.* (alteration in original). The physician also provided an addendum, stating that "[t]his veteran's CAD is *more likely than not* related to both his long []standing smoking and his [hypertension (HPT)]," and that "[i]t is *less likely than not* that the veteran's varicose veins impacted his CAD either positively or negatively." *Id.*

or to service-related conditions.¹⁵⁹ In May 2002, the Board denied Mrs. Mayfield’s appeal.¹⁶⁰ In that decision, the Board referred to the notice provided in the December 1999 RO decision, the June 2000 statement of the case, and the January 2002 supplemental statement of the case.¹⁶¹

ii. *Mayfield at the CAVC*

Mrs. Mayfield appealed to the CAVC, arguing that VA had failed to comply with the VCAA notice requirements.¹⁶² In a March 2004 Order, the CAVC determined that although VA had sent Mrs. Mayfield a letter notifying her of the information necessary to substantiate her claim and which portion of that evidence she must provide and which portion VA would attempt to obtain, VA had failed to request that she submit any evidence in her possession that pertained to the claim.¹⁶³ Consistent with the reasoning of *Pelegri*, the CAVC determined that the lack of notice was not harmless, stating “[i]t is not for the Secretary, or this Court, to predict what evidentiary development may or may not result from the notice required by section 3.159(b),” and remanded the case back to the Board.¹⁶⁴

Following the 2004 CAVC Order, VA moved the CAVC to issue a panel decision.¹⁶⁵ The CAVC withdrew its single-judge order and in April 2005 issued a panel decision, referred to later as “*Mayfield I*,” affirming the Board’s decision.¹⁶⁶ In that decision,

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Mayfield v. Principi*, No. 02-1077, 2004 WL 772121, at *1 (Vet. App. Mar. 23, 2004).

¹⁶³ *Id.* at *2.

¹⁶⁴ *Id.* at *3. The CAVC further indicated that “because the appellant has not had the opportunity to benefit from and react to the notice that the Secretary was and is obligated to provide, any conclusion by the Court that the appellant is not prejudiced would be pure speculation.” *Id.*; see *Daniels v. Brown*, 9 Vet. App. 348, 353 (1996) (noting that the CAVC was unable to find that the error was not prejudicial where “it [was] possible that the appellant would have sought and obtained additional medical opinions, evidence, or treatises”).

¹⁶⁵ *Mayfield I*, 19 Vet. App. at 106.

¹⁶⁶ *Id.* at 106-07.

the CAVC divided the notice required by 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b) into four elements. Element one was notice as to that evidence and information not already in VA's possession that was necessary to substantiate the claim.¹⁶⁷ Elements two and three consisted of notice as to which information and evidence VA had a duty to provide and which the appellant had a duty to provide, respectively.¹⁶⁸ Element four was that duty specified uniquely in the regulation that the Secretary request that the claimant provide any information in the claimant's possession to VA.¹⁶⁹

Mayfield I included a framework of burden assignment for demonstrating the harm or harmlessness of a § 5103(a) error, relying heavily on *Kotteakos* and the language regarding errors that had the natural effect of producing prejudice. As a starting point, the CAVC stated as follows:

[W]e conclude 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.¹⁷⁰

If the appellant accomplished the above, then the burden shifted to the Secretary to persuade “the Court that the purpose of the notice was not frustrated.”¹⁷¹ The CAVC provided three examples of how the Secretary may accomplish this, as follows:

(1) that any defect in notice was cured by actual knowledge on the part of the appellant that certain evidence (i.e., the

¹⁶⁷ *Id.* at 122.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 121.

¹⁷¹ *Id.*

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.¹⁷²

This framework applied for element two, three, and four type errors and for timing errors.¹⁷³ If the error was of a type involving element one notice, which the CAVC stated had the natural effect of producing prejudice, the appellant was only required to identify the defect in the notice.¹⁷⁴ The burden then shifted to the Secretary to demonstrate that there clearly was no prejudice to the appellant based on any failure to provide element one notice.¹⁷⁵

Applying this framework to the Board decision at issue, the CAVC determined that the documents cited by the Board along with a March 2001 notice letter that VA had sent to Mrs. Mayfield, met the first and fourth element notice requirements.¹⁷⁶ Relying only on the March 2001 letter, the CAVC found that VA had provided the appellant with the required second and third element notice.¹⁷⁷ As to the defect in timing, none of the documents having been sent prior to the initial adjudication by the RO, the CAVC determined that subsequent action by VA had rendered that error harmless.¹⁷⁸

iii. *Mayfield at the Federal Circuit*

Mrs. Mayfield appealed that decision to the Federal Circuit and that court reversed the CAVC decision.¹⁷⁹ The Federal Circuit first determined that the Board had improperly concluded that an RO decision, a statement of the case, and a supplemental

¹⁷² *Id.* (citations omitted).

¹⁷³ *Id.* at 122-23.

¹⁷⁴ *Id.* at 122.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 124-27.

¹⁷⁷ *Id.* at 125-26.

¹⁷⁸ *Id.* at 129.

¹⁷⁹ *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

statement of the case provided VCAA notice.¹⁸⁰ In part, the Federal Circuit found this to be an error because these documents postdated the initial adjudication by the RO.¹⁸¹ This was a particularly technical distinction given that the initial adjudication by the RO occurred prior to enactment of the VCAA. Additionally, the Federal Circuit found it important that the requirements for decisions, statements of the case, and supplemental statements of the case differed from the requirements of § 5103(a) notice.¹⁸² Finally, the Federal Circuit stated that these particular documents did not contain the information expressly required by § 5103(a).¹⁸³ As to the CAVC's reliance on the March 2001 letter, which the Board decision did not mention, the Federal Circuit held that this reliance violated the rule of *Securities and Exchange Commission v. Chenery Corp.* that a court could not uphold an administrative agency decision on grounds different than that invoked by the agency.¹⁸⁴ Of note is that this application could be said to extend *Chenery* further than the Court intended.¹⁸⁵

iv. *After Mayfield II*

Following the Federal Circuit's decision in *Mayfield II*, the CAVC issued an order remanding the case back to the Board.¹⁸⁶ Pursuant to that order, in August 2006 the Board issued a supplemental decision finding that the March 2001 letter had provided Mrs. Mayfield with the requisite statutory and regulatory notice.¹⁸⁷ In December 2006, the CAVC upheld the Board's 2002 decision as supported by the supplemental decision in August 2006.¹⁸⁸ Mrs. Mayfield again appealed

¹⁸⁰ *Id.* at 1332.

¹⁸¹ *Id.* at 1333-34.

¹⁸² *Id.* at 1333.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1334 (citing *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

¹⁸⁵ C. Robert Luthman, Note, *Conway v. Principi, Mayfield v. Nicholson, and (Re?) Defining the Harmless Error Doctrine in Light of the Veterans Claims Assistance Act of 2000*, 16 FED. CIRCUIT B.J. 509, 529-30 (2007).

¹⁸⁶ *Mayfield v. Nicholson*, 20 Vet. App. 98 (2006).

¹⁸⁷ No. 00-14 274, 2006 WL 4420443 (BVA Aug. 8, 2006).

¹⁸⁸ *Mayfield v. Nicholson*, 20 Vet. App. 537, 539 (2006).

to the Federal Circuit and the Federal Circuit upheld the CAVC decision in September 2007.¹⁸⁹

Therefore, as of September 2007, the result was unchanged from that of the RO decision almost eight years earlier. This case indicates that the law surrounding § 5103(a) had become so technical as to bring to mind the purpose of harmless error analysis in the first place: To prevent errors that did not matter from requiring unnecessary expenditure of judicial, and now agency, resources.

C. The Federal Circuit Adjusts the Framework

Shinseki arose from two separate cases, those of Woodrow F. Sanders and Patricia D. Simmons.¹⁹⁰

i. The Sanders Case

Mr. Sanders served in the U.S. Army from 1942 to 1945.¹⁹¹ He filed his initial claim for VA benefits in 1948, asserting entitlement to service connection for a right eye disability [which in a subsequent August 1991 claim he described as due to injuries he suffered to the right side of his face as the result of a bazooka explosion, although the service medical treatment records did not record any injuries].¹⁹² In December 1948, Mr. Sanders was diagnosed with chronic right eye choroidoretinitis, an inflammation of the choroid and retina.¹⁹³ The RO denied his claim in 1949.¹⁹⁴ Forty-two years later Mr. Sanders requested that VA reopen his claim, and he submitted statements from a VA ophthalmologist and a private ophthalmologist.¹⁹⁵ The private ophthalmologist reported that Mr. Sanders had told him that he injured his right eye during a battle in which he fell after a bridge

¹⁸⁹ *Mayfield v. Nicholson*, 499 F.3d 1317, 1324 (Fed. Cir. 2007).

¹⁹⁰ *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007); *Simmons v. Nicholson*, 487 F.3d 892, 896 (Fed. Cir. 2007).

¹⁹¹ *Sanders v. Nicholson*, No. 03-1846, 2005 WL 2055933 (Vet. App. Aug. 25, 2005).

¹⁹² *Id.* at *1.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

blew up underneath him.¹⁹⁶ The VA ophthalmologist opined that it was not inconceivable that Mr. Sanders's chorioretinal scars could have resulted from trauma.¹⁹⁷

In July 1994, the RO determined that Mr. Sanders's previously denied claim could not be reopened.¹⁹⁸ Mr. Sanders appealed that decision; the Board reopened his claim in June 2000 and remanded the claim to the RO so that a VA ophthalmologic examination could be conducted to determine the etiology of his eye condition.¹⁹⁹ In December 2000, after examining Mr. Sanders and reviewing his medical history, a VA ophthalmologist opined that his chorioretinitis was most likely of an infectious nature, that it was impossible to determine its etiology, and that while it was possible that Mr. Sanders contracted an infection during service, it was impossible to prove one way or the other.²⁰⁰ Another VA ophthalmologist examined Mr. Sanders in August 2001.²⁰¹ This examiner opined that it was possible that Mr. Sanders's macular scar could be related to the in-service trauma described by Mr. Sanders.²⁰² After weighing the evidence, the Board denied Mr. Sanders's appeal in October 2003.²⁰³ Mr. Sanders appealed to the CAVC, contending that VA failed to tell him who would ultimately be responsible for obtaining evidence necessary to substantiate his claim, a contended error that did not involve first element § 5103(a) notice as defined by the CAVC.²⁰⁴ Determining that Mr. Sanders had not shown how the error affected the essential fairness of the adjudication, the CAVC affirmed the Board's decision.²⁰⁵ Mr. Sanders appealed to the Federal Circuit.

¹⁹⁶ *Id.* at *2.

¹⁹⁷ *Id.* at *1.

¹⁹⁸ *Id.* at *2; *see* 38 U.S.C. § 5108 (2006) (providing that a decision that has become final generally cannot be reopened unless new and material evidence is added to the record).

¹⁹⁹ *Sanders*, 2005 WL 2055933, at *2.

²⁰⁰ *Id.* at *3.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at *4.

²⁰⁴ *Id.* at *7.

²⁰⁵ *Id.*

In May 2007, the Federal Circuit reversed the CAVC decision.²⁰⁶ In its analysis, the Federal Circuit determined that the CAVC was incorrect in allocating the burden differently based upon the type of § 5103(a) notice error.²⁰⁷ This court explained its view that requiring the claimant to show prejudice from any type of § 5103(a) notice error was at odds with the non-adversarial, pro-claimant nature of the VA adjudication system.²⁰⁸ This appears to meld the non-adversarial agency proceedings with the inherently adversarial CAVC proceedings. Furthermore, this view ignores that it is the CAVC, not the agency, that is tasked by statute to take due account of the rule of prejudicial error.²⁰⁹

The Federal Circuit also reasoned that Congress would not have included in the statute that VA provide notice as to the claimant's and VA's respective duties in obtaining evidence and information if Congress did not think such notice was important.²¹⁰ The Federal Circuit intimated that it was up to Congress, not the CAVC, to decide whether error as to one part of the notice requirements was to be presumed prejudicial but not errors as to the other parts.²¹¹ As to fourth element notice (informing the claimant to submit evidence in his or her possession), the Federal Circuit agreed with the CAVC's explanation that an error in this type of notice could only matter if the claimant actually had probative evidence in his or her possession, but found that this did not warrant shifting the burden of establishing prejudice onto the appellant.²¹²

Finally, the Federal Circuit explained that it had previously held that post-decisional documents could never satisfy VCAA notice requirements because Congress had intended that VA

²⁰⁶ *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007).

²⁰⁷ *Id.* at 889.

²⁰⁸ *Id.*

²⁰⁹ *Mayfield v. Nicholson*, 20 Vet. App. 537, 543 (2006) (explaining that although the CAVC, not the Board, was required to consider whether an error was harmless, the Board was not prohibited from doing so).

²¹⁰ *Sanders*, 487 F.3d at 890.

²¹¹ *Id.* at 890-91.

²¹² *Id.* at 890.

provide the notice to the claimant prior to the initial adjudication of the claim, and that the CAVC could not disregard congressional intent.²¹³ In summary, the Federal Circuit’s decision placed the burden on the government to show that a § 5103(a) notice error was not prejudicial to the claimant, regardless of the nature of that error. This decision did not disturb all aspects of *Mayfield I*, as the Federal Circuit restated that VA could demonstrate that a VCAA notice error was harmless by showing: “(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.”²¹⁴

In June 2008, the U.S. Supreme Court granted the government’s petition for certiorari.²¹⁵

ii. *The Simmons Case*

Ms. Simmons entered the U.S. Navy in December 1978, and three months into her tour of duty she was found to have a hearing impairment.²¹⁶ Upon discharge in April 1980, she filed a claim for VA benefits for her hearing loss.²¹⁷ In November 1980, the RO established service connection for a left ear hearing loss disability, determining that Ms. Simmons’s work environment during service had aggravated her hearing loss.²¹⁸ However, the extent of her left ear hearing loss did not meet the level of monetary compensation under the applicable schedule for rating disabilities.²¹⁹

In 1998 Ms. Simmons requested that VA reevaluate her left ear hearing loss to determine if the disability had worsened to the

²¹³ *Id.* at 890-91.

²¹⁴ *Id.* at 889.

²¹⁵ *Peake v. Sanders*, 128 S. Ct. 2935 (2008) (mem.).

²¹⁶ *Simmons v. Nicholson*, No. 03-1731, 2005 WL 3312625, at *1 (Vet. App. Dec. 1, 2005).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

extent of warranting compensation.²²⁰ She also requested that VA award benefits for her right ear hearing loss, contending that since her left ear hearing had worsened, it had caused her right ear to have to work harder to compensate for the loss of hearing in her left ear.²²¹ In August 1998, the RO denied her claim for service-connection for a right ear hearing loss.²²² Ms. Simmons appealed that decision to the Board.²²³

The Board remanded Ms. Simmons's claim to the RO to provide her with the notice required by the then newly enacted VCAA and to obtain a medical expert's opinion as to whether her right ear hearing loss was caused or aggravated by her left ear hearing loss.²²⁴ In March 2001, the RO sent Ms. Simmons a letter as to VA's duties to notify and assist, and scheduled a VA medical examination to evaluate her right ear hearing loss.²²⁵ Ms. Simmons did not appear for the examination so the RO sent her another letter explaining the possible adverse consequences on her claim by failing to report and requesting that she provide her reasons for failing to report.²²⁶ Ms. Simmons replied in April 2002 that she had recently moved and had therefore not received notice of the examination.²²⁷ She listed her new address, including a street address number of "141," and informed the RO that she would be available for another examination.²²⁸ The RO rescheduled an examination in November 2002, and again Ms. Simmons failed to show.²²⁹ Although the November 2002 letter was not part of the record before the CAVC, a December 2002 letter indicated that the RO had again written her asking why she did not appear.²³⁰ That December 2002 letter was incorrectly addressed, the

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at *2.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

house number having been transposed to “114” from the “141” number Ms. Simmons had provided the RO.²³¹

In February 2003, the RO issued a supplemental statement of the case addressed to the same incorrect house number, informing Ms. Simmons that her claim had been denied.²³² That letter included the explanation that as she had failed to appear twice for scheduled examinations she had forfeited her right to an examination and that the evidence of record did not establish service connection for her right ear hearing loss.²³³

In June 2003, the Board denied Ms. Simmons’s appeal, finding that VA had complied with its duties to notify and assist under the VCAA, and that the evidence of record did not establish that her right ear hearing loss was linked to service or that her service-connected left ear hearing loss warranted compensation.²³⁴

Ms. Simmons appealed the Board decision to the CAVC contending that VA had failed to provide element one, two, and three § 5103(a) notice and that she was never informed of the November 2002 VA medical examination because the notification was not sent to the correct address.²³⁵ Finding that Ms. Simmons had rebutted a presumption that VA had mailed the notice of her examinations to the correct address and that VA had not shown that she had received the notices or that the RO had indeed mailed the notices to the correct address, the CAVC determined that a remand was necessary for the Board to ensure that a new examination was provided to Ms. Simmons unless it could provide either clear evidence that Ms. Simmons was mailed the notice or proof of actual receipt of the information by Ms. Simmons.²³⁶ The CAVC also found that with regard to Ms. Simmons’s claim for a compensable rating for her left ear hearing loss, VA had not

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at *3.

²³⁶ *Id.* at *5.

provided the required element one § 5103(a) notice and had not demonstrated that the notice error was not prejudicial to Ms. Simmons.²³⁷

VA appealed the CAVC decision to the Federal Circuit arguing that the CAVC erred by presuming that the § 5103(a) notice error was prejudicial to Ms. Simmons and requiring VA to demonstrate harmlessness of the error.²³⁸ Having just decided *Sanders*, the Federal Circuit rejected that argument and affirmed the CAVC decision.²³⁹ As with Mr. Sanders's case, in June 2008, the U.S. Supreme Court granted the government's petition for certiorari.²⁴⁰

D. The Supreme Court Resolves Burden Allocation

In April 2009, the Supreme Court issued *Shinseki*, holding that the appellant contending prejudice resulting from a § 5103(a) error has the burden of showing that the error was prejudicial.²⁴¹ The Court found the Federal Circuit's prejudicial error framework to conflict with the CAVC's statutory duty to take due account of the rule of prejudicial error because that framework imposed unreasonable burdens on VA, was too complex and rigid, and had the likelihood of requiring the CAVC to too often find harmless errors prejudicial.²⁴² In so holding, the Court reviewed the CAVC's duty under 38 U.S.C. § 7261 to take due account of the rule of prejudicial error, finding that Congress intended the CAVC to adopt the accepted approach of the APA harmless error rule of 5 U.S.C. § 706.²⁴³ Determining that there was no relevant difference between how courts applied harmless error analysis in civil and administrative law cases, the Court reviewed the history of the harmless error rule in both criminal and

²³⁷ See *id.* at *6-7 (finding that the March 2001 letter had only provided notice as to the requirements to establish service connection but not the evidence needed to substantiate Ms. Simmons's claim for an increased rating for her left ear hearing loss).

²³⁸ *Simmons v. Nicholson*, 487 F.3d 892, 896 (Fed. Cir. 2007).

²³⁹ *Id.*

²⁴⁰ *Peake v. Sanders*, 128 S. Ct. 2935 (2008) (mem.).

²⁴¹ *Shinseki v. Sanders*, 129 S. Ct. 1696, 1705-06 (2009).

²⁴² *Id.* at 1704.

²⁴³ *Id.*

civil cases.²⁴⁴ Quoting from *Palmer*, and drawing support from later civil cases including *McDonough*, the Court indicated that the Federal Circuit's decision in *Sanders* allocating to VA the burden of showing harmlessness of a § 5103(a) error, rather than allocating to the appellant the burden of showing prejudice, did not correspond to the burden allocation in civil cases "that the party that 'seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.'"²⁴⁵

Perhaps more firmly than previously, the Court established a clean dividing line between cases with stakes characteristic of civil as opposed to criminal law.²⁴⁶ Referring to *Kotteakos*, the Court explained that the Court had placed the burden on the appellee only where the stakes involved were of a criminal law nature.²⁴⁷ Where the stakes included loss of liberty, there was a good reason for requiring the government to explain why the complained of error should not disturb the judgment of the trial court.²⁴⁸ Precedent provided no basis for placing the burden on the appellee in a civil case such as a claim for benefits administered by VA.

The Court explained that after the Federal Circuit's *Sanders* decision, the complex and rigid system in place kept the CAVC from determining whether the error was harmless based on the "facts and circumstances of the particular case."²⁴⁹ Providing an indication that the CAVC should take an in depth analysis of all evidence of record in making its determination as to whether a § 5103(a) notice error caused harm, the Court remarked that the existing framework "would require the reviewing court to find the notice error prejudicial even if that court, having read the entire record, conscientiously concludes the contrary."²⁵⁰

²⁴⁴ *Id.* at 1704-05.

²⁴⁵ *Id.* at 1705-06 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943)) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984)).

²⁴⁶ *Id.* at 1706.

²⁴⁷ *Id.* (citing *Kotteakos v. United States*, 328 U.S. 750, 760 (1946)).

²⁴⁸ *Id.* at 1706.

²⁴⁹ *Id.* at 1705.

²⁵⁰ *Id.*

The Court explained that harmless error analysis is informed by various case specific factors, including the following:

[A]n estimation of the likelihood that the result would have been different, an awareness of what body . . . ha[d] the authority to reach that result, a consideration of the error’s likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings, and a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference.²⁵¹

For want of a better term, this is essentially a totality of the circumstances analysis.

Demonstrating how to determine whether an error was harmful, the Court took into consideration Mr. Sanders’s entire history of involvement with the VA claims process, including that he had undergone numerous medical examinations and had “pursued his claim for over six decades.”²⁵² Also significant to the Court was that Mr. Sanders had not told any court what additional evidence he would have obtained or sought if he had been given proper notice or how the lack of notice made any difference.²⁵³ The Court agreed with the CAVC that Mr. Sanders’s case was not a borderline case.²⁵⁴ From these circumstances, the Court concluded Mr. Sanders “should be aware of the respect in which his benefits claim is deficient (namely, his inability to show that his disability is connected to his World War II service).”²⁵⁵ Given this analysis, it is clear that knowledge should be imputed to the claimant from the history of the claimant’s participation in the VA claims process, regardless of the passage of time.

²⁵¹ *Id.* at 1707.

²⁵² *Id.* at 1708.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

In analyzing Ms. Simmons's case, the Court also looked at all of the circumstances. This case the Court found more complex, with more circumstances to weigh in determining whether the error was prejudicial to Ms. Simmons.²⁵⁶ Indications of lack of prejudice included that Ms. Simmons had a long history of seeking VA benefits and undergoing VA examinations, and therefore should have known how the system worked and what was needed to substantiate her claim.²⁵⁷ The Court found two factors weighing in favor of a finding of prejudice. First, Ms. Simmons's left ear hearing loss, the only issue before the Court, was already service connected and had deteriorated over time.²⁵⁸ Second, VA scheduled Ms. Simmons for an examination of her right ear, and if notice of that examination had been provided to Ms. Simmons, the examination might have demonstrated that her left ear hearing loss had worsened.²⁵⁹ Stating that these factors gave rise to too much uncertainty, the Court did not determine whether the error in Ms. Simmons's case was prejudicial or harmless, but instead remanded the matter to the CAVC to decide the matter in the first instance.²⁶⁰

Of interest is that in neither Ms. Simmons's nor Mr. Sanders's case did the Court find that the errors were prejudicial, in essence determining that it was not prejudicial in Mr. Sanders's case and making no determination in Ms. Simmons's case. Given the Court's consideration of the 60 years from the date of Mr. Sanders's first claim until the present, and the Court's concern over the problems in notice to Ms. Simmons of the scheduled examinations, it is clear that all circumstances surrounding the specific case must be considered by the CAVC in determining if a VCAA notice error was prejudicial.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

IV. PREJUDICIAL ERROR AND THE VCAA AFTER *SHINSEKI*

In *Shinseki*, the Supreme Court expressly stated that it was not deciding two matters.²⁶¹ First, that it would not decide the lawfulness of the CAVC’s use of the “natural effects” of certain kinds of errors.²⁶² Second, that the Court would not decide what the CAVC might consider as harmful error in a veteran’s case.²⁶³ This article addresses the second matter.

A. Need for a Clear Standard of Prejudice

If the CAVC determines that a § 5103(a) notice error is harmful, then, in most instances, the CAVC will be left with no choice but to require VA to expend additional resources on a matter that had already been decided. Now that it is settled that the appellant has the burden of demonstrating prejudice from such error, the question that naturally follows is what does the appellant have to do to meet the burden, or stated another way, how sure must the CAVC be that such error resulted in prejudice in order to require that additional resources be expended on the matter.

One way of discussing this question is in terms of a “test” or “standard” for determining if prejudice resulted from the error, or, stated in the negative, determining if the error was harmless.²⁶⁴ Roger J. Traynor, former Chief Justice of the Supreme Court of California, suggested that in determining whether an error was harmful, an appellate court is gauging the probability that the error

²⁶¹ *Id.* at 1706-07.

²⁶² *Id.*

²⁶³ *Id.* at 1707.

²⁶⁴ See *O’Neal v. McAninch*, 513 U.S. 432, 438-39 (1995) (referring to the *Kotteakos* ‘standard’ and the *Chapman* ‘standard’); *Chapman v. California*, 386 U.S. 18, 24 (1967) (stating that “[w]hile appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy*, case”); *Obrey v. Johnson*, 400 F.3d 691, 699 (9th Cir. 2005) (referring to prejudicial error analysis as involving a “test for prejudice” and in terms of a “standard”).

was harmful.²⁶⁵ For the purposes of this article, the term “standard of prejudice” means the degree of probability that a § 5103(a) error was prejudicial to the appellant, and by definition, the extent to which the appellant must show that he or she was prejudiced by the error in order to meet the burden allocated to the appellant in *Shinseki*.

Since the Court issued *Shinseki*, and as of this writing, the CAVC has not specified a standard of prejudice for § 5103(a) errors. Borrowing from other sources, this article considers three possible standards: (1) that the error is more probably than not prejudicial, (2) that it is highly probable that the error is prejudicial, or (3) that it is beyond a reasonable doubt that the error is prejudicial.²⁶⁶ Expressing the standard of prejudice in this manner has two advantages. First, it keeps the standard in language of showing prejudice rather than harmlessness, more in keeping with how the burden has now been allocated by the Court and in keeping with the language of 38 U.S.C. § 7261(b)(2). Second, stating the standard in language of probability allows for more ready investigation as to the logic other courts have used to analyze when an error should be either disregarded or give rise to a new adjudication.

The CAVC reviews questions of law *de novo* without any deference to the Board’s findings and reviews questions of fact under a clearly erroneous standard.²⁶⁷ This, however, does not define the standard of prejudice. Indeed, whether or not the Board discusses if an error was prejudicial, the CAVC remains the body charged with taking due notice of the rule of prejudicial error.²⁶⁸

²⁶⁵ TRAYNOR, *supra* note 10, at 29-30.

²⁶⁶ See *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1458 n.7 (9th Cir. 1983) (noting that “appellate courts have three possible standards of review: harmless beyond a reasonable doubt; high probability of harmlessness; and more probably than not harmless”); TRAYNOR, *supra* note 10, at 29-30.

²⁶⁷ 38 U.S.C. § 7261 (2006); *Celano v. Peake*, 22 Vet. App. 341, 347 (2009).

²⁶⁸ *Newhouse v. Nicholson*, 497 F.3d 1298, 1301-02 (Fed. Cir. 2007) (explaining that the CAVC is the entity which is required by statute to determine if an error was prejudicial and in order to do so is not restricted to the facts found by the Board but must review the entire administrative record).

In *Mayfield I*, the CAVC briefly discussed a definition of prejudicial error, comparing 38 U.S.C. § 7261(b)(2)'s requirement that the CAVC take due account of the rule of prejudicial error to Rule 61 of the Federal Rules of Civil Procedure, 28 U.S.C. § 2111, *Kotteakos v. United States*, and *McDonough Power Equipment, Inc. v. Greenwood*, all of which phrased harmless error in terms of substantial rights.²⁶⁹ Drawing from the Court's language in *McDonough*, the CAVC stated "that an error is prejudicial if it affects the 'substantial rights' of the parties in terms of 'the essential fairness of the [adjudication].'"²⁷⁰ The CAVC further provided that the interest furthered by § 5103(a) was that a claimant should have a "meaningful opportunity to participate effectively in the processing of his or her claim."²⁷¹ In *Overton v. Nicholson*,²⁷² the CAVC affirmatively stated that "[a]ny error that renders a claimant without that meaningful opportunity must be considered prejudicial because such error would indeed have affected the essential fairness of the adjudication."²⁷³ This, however, amounted to replacing the words "substantial rights" from the harmless error statute cited in *Kotteakos* with the words "essential fairness of the adjudication" but still did not define a standard for determining if the substantial rights were affected.

Identifying the substantial right at issue as "the essential fairness of the adjudication" or the interest furthered by § 5103(a) as "a meaningful opportunity to participate in the processing of the claim" does not answer the question as to what constitutes prejudicial error unless such identification points to one of very few "structural errors" for which harmless error analysis is never applicable.²⁷⁴ Former Chief Justice Traynor pointed out that language such as

²⁶⁹ *Mayfield v. Nicholson*, 19 Vet. App. 103, 112-13 (2005).

²⁷⁰ *Id.* at 115 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984)).

²⁷¹ *Id.* at 120-21.

²⁷² 20 Vet. App. 427 (2006).

²⁷³ *Id.* at 435.

²⁷⁴ *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (listing as structural errors not subject to harmless error analysis, unlawful exclusion of members of the defendant's race from the jury, a biased trial judge, denial of right to counsel, denial of right of self representation, and denial of the right to a public trial).

“affect the substantial rights of the parties” is not a means for determining if the error was harmless.²⁷⁵

At an even more fundamental understanding of the term “affected the substantial rights” is the statutory language relied on in *Kotteakos* which was as follows:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.²⁷⁶

This is more a definition of harmless error than a standard for determining if an error was harmless or prejudicial.

In *Mayfield I*, the CAVC rejected the Secretary’s argument that an error is prejudicial only when the party claiming the error demonstrates that the outcome below would have been different but for the error.²⁷⁷ Instead, the CAVC stated that the failure of the party to demonstrate that the error did affect the outcome of the case did not mean that the error was harmless.²⁷⁸ What the CAVC said was important was whether the adjudication was essentially fair.²⁷⁹ The CAVC did not explain how, if the outcome was not affected by the error, it could be said that the adjudication was not essentially fair or why the fairness would matter.

In *Shinseki*, the Court referred to whether the outcome of the case was affected as being determinative as to whether the error was harmless.²⁸⁰ First, in discussing the different burden allocation

²⁷⁵ TRAYNOR, *supra* note 10, at 15-16.

²⁷⁶ *Kotteakos v. United States*, 328 U.S. 750, 757 (1946) (quoting “the harmless error statute” section 269 of the Judicial Code, as amended, 28 U.S.C. § 391).

²⁷⁷ *Mayfield v. Nicholson*, 19 Vet. App. 103, 115-16 (2005).

²⁷⁸ *Id.* at 116.

²⁷⁹ *Id.*

²⁸⁰ 129 S. Ct. 1696, 1706, 1708 (2009).

in criminal as opposed to civil cases, the Court stated: “And the fact that the Government must prove its case beyond a reasonable doubt justifies a rule that makes it more difficult for the reviewing court to find that an error did not affect the outcome of a case. But in the ordinary civil case that is not so.”²⁸¹ Second, in analyzing Mr. Sanders’s case, the Court questioned “[h]ow could the VA’s failure to specify this (or any other) division of labor have mattered[.]”²⁸² Clearly, the Court’s view was that the complained of error must have affected the outcome of the case in order for the error to have been prejudicial to the appellant. Whether the appellant had a meaningful opportunity to participate in the processing of the claim only matters if participation in that processing would have affected the outcome. While it may not need to be shown that the outcome would definitely have been different in order for an error in § 5103(a) notice to be found prejudicial, if that error did not affect the outcome of the case, the error could not have been prejudicial in any practical sense. The question is how sure must the reviewing court be that the error affected the outcome before it can be said that the error was prejudicial.

B. Interaction of a Standard of Prejudice and Burden Allocation

Care should be taken in formulating a standard of prejudice, and once the standard is chosen, consistency in language when applying the standard will avoid the pitfalls that other courts have encountered. This is particularly true when discussing § 5103(a) notice errors because the burden allocation is now firmly fixed; it is with the appellant. An understanding of how the allocation of burden and the standard of prejudice are linked can be gleaned from two sets of cases, one from the Supreme Court and one from the Ninth Circuit.

²⁸¹ *Id.* at 1706 (citation omitted).

²⁸² *Id.* at 1708.

i. *The Supreme Court Cases*

In the June 1993 case of *Brecht v. Abrahamson*,²⁸³ the Court determined that the *Chapman* standard for determining whether a constitutional trial error was harmless was inapplicable to a collateral attack on a criminal conviction through a petition for a writ of habeas corpus.²⁸⁴ Instead of applying a standard that the state must show beyond a reasonable doubt that the error was harmless, the *Brecht* Court determined that the less strict *Kotteakos* standard should apply.²⁸⁵ The Court quoted the *Kotteakos* standard as “whether the error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’”²⁸⁶ Immediately after choosing the *Kotteakos* standard, the *Brecht* Court stated as follows: “Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in ‘actual prejudice.’”²⁸⁷ Looking at all of the evidence of record, the Court determined that infringement on the defendant’s Fifth Amendment right against self incrimination had not had injurious effect or influence on the jury’s verdict and determined that the error was harmless.²⁸⁸

In *O’Neal v. McAninch*,²⁸⁹ decided less than two years after *Brecht*, the Court also concluded that the *Kotteakos* standard rather than the *Chapman* standard was proper for review of a habeas case involving constitutional trial error.²⁹⁰ At the outset, the Court referred to what it termed the unusual circumstance where the reviewing court in a habeas case is in grave doubt as to whether or not a constitutional trial error is harmless.²⁹¹ In borrowing the

²⁸³ 507 U.S. 619 (1993).

²⁸⁴ *Id.* at 622-23.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 637.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 638-39.

²⁸⁹ 513 U.S. 432 (1995).

²⁹⁰ *Id.* at 439.

²⁹¹ *Id.* at 435.

phrase “grave doubt” from *Kotteakos*, the Court explained its meaning as “in the judge’s mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.”²⁹² Explaining how this related to burden allocation, the Court remarked that under *Brecht*’s allocation of the burden in cases of grave doubt the writ would be denied.²⁹³

Acknowledging that habeas is a civil, rather than criminal proceeding, the *O’Neal* Court nevertheless found it unacceptable that, under *Brecht*’s allocation of burden, in a close case involving a criminal law type stake, imprisonment, the writ would be denied.²⁹⁴ The *O’Neal* Court was left with accounting for the burden allocation in *Brecht*.²⁹⁵ It did so by explaining that, with regard to burden allocation, the *Brecht* opinion was not a majority view, four justices having dissented and one justice having stated in a concurring opinion that the *Kotteakos* standard applied in its entirety.²⁹⁶ The Court also found important that in the paragraph in which the *Brecht* Court adopted the *Kotteakos* standard and included the sentence regarding burden allocation, the *Brecht* Court had not explained why an exception was being made to the *Kotteakos* standard.²⁹⁷

These cases demonstrate that the standard of harmlessness and the allocation of burden as to harmless error are interconnected. If either the standard or the allocation of burden has already been determined, then specifying the other must take into account the one that has been determined. As it is settled that the appellant has the burden of showing that a § 5103(a) error was prejudicial, the wording of the standard of prejudice should reflect that when the CAVC is in grave doubt as to whether the error was prejudicial, the finding must be that it was not prejudicial and the Board decision must stand.

²⁹² *Id.*

²⁹³ *Id.* at 436.

²⁹⁴ *Id.* at 440-42.

²⁹⁵ *Id.* at 438-39.

²⁹⁶ *Id.* at 439.

²⁹⁷ *Id.*

ii. *The Ninth Circuit Cases*

Evident from the foregoing discussion, there are many ways to phrase the standard of harmlessness, or in veterans benefits law, the standard of prejudice. Different language, though, is not merely a matter of semantics. Inattention to the language used to discuss the standard of prejudice runs the risk of unintended changes in burden allocation.

One of the choices in formulating a standard of prejudice is whether to express the standard in negative as opposed to positive terms. The standard can be phrased in terms of the probability that the error was harmless or the probability that the error was prejudicial. Keeping the language of the standard consistent with the burden allocation, as well as staying consistent in expressing the standard, will lessen the likelihood of confusion and of unintentionally allocating the burden inconsistent with the Court's holding in *Shinseki*.

That there can be unintended consequences of rephrasing a standard is demonstrated by the Ninth Circuit's cases regarding harmless error in a civil context. In *Haddad v. Lockheed California Corp.*,²⁹⁸ the Ninth Circuit addressed whether admission of privileged marital communication evidence in an employment discrimination suit was harmless error.²⁹⁹ The Ninth Circuit first phrased the question in terms of harm as “[h]ow probable must the harm from an error in a civil trial be before it affects substantial rights and thus requires reversal[.]”³⁰⁰ This is a formulation more in fitting with allocating the burden to the party asserting that the error requires reversal. In reaching its conclusion as to the standard to adopt, the Ninth Circuit stated as follows: “[W]hen an appellate court ponders the probable effect of an error on a civil trial, it need only find that the jury's verdict is more probably than not untainted by the error.”³⁰¹

²⁹⁸ 720 F.2d 1454 (9th Cir. 1983).

²⁹⁹ *Id.* at 1457-60.

³⁰⁰ *Id.* at 1458.

³⁰¹ *Id.* at 1459.

The *Haddad* standard is expressed in terms of harmlessness, requires that the error be more probably than not harmless to uphold the judgment below, and places the burden on the party seeking to uphold the judgment because if that party cannot show that the error was more probably than not harmless, the alternative is that the error was harmful and the case must be vacated and relitigated.

Two years later, in *Kisor v. Johns-Manville Corp.*,³⁰² the Ninth Circuit referred to the *Haddad* holding as “[t]o reverse, [the court] must say that more probably than not, the error tainted the verdict.”³⁰³ This of course is not what was held in *Haddad*. *Kisor* inadvertently changed the standard and the burden allocation. The *Kisor* standard is expressed in terms of harm, requires that the error be more probably than not harmful to vacate the judgment below, and places the burden on the party seeking to undo the judgment below because if the party cannot show that the error was harmful, the alternative is that the error was harmless and the judgment below stands.

In the 1991 case of *Pau v. Yosemite Park & Curry Co.*,³⁰⁴ the Ninth Circuit recognized this inadvertent error but that case was not close enough for the difference in standards to matter.³⁰⁵ It was in the 2005 case of *Obrey v. Johnson*³⁰⁶ that the Ninth Circuit had an opportunity to correct the error.³⁰⁷ In that case, the Ninth Circuit noted that its statements in *Kisor* and *Haddad* dictated completely different results in a close case.³⁰⁸ The Ninth Circuit expressed this difference in terms of presumptions, stating as follows: “[I]n a close case, where the reviewing court is uncertain of the effect of an evidentiary error on the jury’s verdict, these two standards create contradictory presumptions.’ Under *Haddad*’s formulation, we presume prejudice; under *Kisor*, we appear to presume the

³⁰² 783 F.2d 1337 (9th Cir. 1986), *abrogated by* *Obrey v. Johnson*, 400 F.3d 691 (9th Cir. 2005).

³⁰³ *Id.* at 1340.

³⁰⁴ 928 F.2d 880 (9th Cir. 1991).

³⁰⁵ *Id.* at 888.

³⁰⁶ 400 F.3d 691 (9th Cir. 2005).

³⁰⁷ *Id.* at 699.

³⁰⁸ *Id.*

opposite.”³⁰⁹ Ultimately, the Ninth Circuit chose the *Haddad* standard, placing the burden on the party seeking to uphold the judgment below and creating a presumption of harm.³¹⁰

What should be taken from these cases is that a heightened attention to wording is necessary when stating and restating a standard of prejudice. Rephrasing a standard in terms of harmlessness that had previously been phrased in terms of harm, or prejudice, requires care. This is not to say that it is impossible to equate standards phrased in terms of harm and harmlessness. In *Fahy v. State of Connecticut*,³¹¹ the Court formulated a standard that the error could not be deemed harmless if there was a reasonable possibility that the unconstitutionally obtained evidence admitted at trial contributed to a criminal conviction.³¹² In *Chapman v. California*,³¹³ the Court again addressed the language of a test for harmlessness in the context of constitutional errors in the admission of evidence at a criminal trial, commenting that there was little if any difference between the *Fahy* standard of a reasonable possibility that the evidence complained of might have contributed to the verdict, and holding the state to the burden of proving beyond a reasonable doubt that the error complained of did not contribute to the verdict.³¹⁴ While perhaps equating two such standards is possible, such is risky and should be avoided. Precise and consistent language in applying the chosen standard will likely avoid the pitfall encountered by the Ninth Circuit.

What should not be taken from the Ninth Circuit line of cases is the standard adopted in *Haddad* and reiterated correctly in *Obrey*. The Ninth Circuit had the option of allocating the burden and creating the attendant presumption at the same time that it formulated its standard for determining if an error was harmless. This is not the case

³⁰⁹ *Id.* (quoting *Ortega v. O'Connor*, 50 F.3d 778, 780 n.2 (9th Cir. 1995)) (citing *Pau*, 928 F.2d at 888 & n.2).

³¹⁰ *Id.* at 700.

³¹¹ 375 U.S. 85 (1963).

³¹² *Id.* at 86-87.

³¹³ 386 U.S. 18 (1967).

³¹⁴ *Id.* at 24.

with § 5103(a) notice errors; the burden is allocated to the appellant. This dictates that the standard should be phrased in terms of harm, or prejudice, and not in terms of harmlessness.

C. Reasoning in Arriving at a Standard of Prejudice

More is to be mined from *Haddad* as well as commentary on that case from the Third Circuit. In *Haddad*, the Ninth Circuit framed its task as choosing a standard from options of (1) harmless beyond a reasonable doubt, (2) a high probability of harmlessness, or (3) more probably than not harmless.³¹⁵

Ultimately, the Ninth Circuit appeared to confine its choices to the two extremes on its list and chose the more probably than not harmless standard.³¹⁶ Driving that choice was the distinction between the burden of proof in a civil trial as opposed to the burden of proof in a criminal trial.³¹⁷ The Ninth Circuit determined that the standard for determining if a trial error was harmless should mirror the burden of proof at trial.³¹⁸

One of the reasons that the Ninth Circuit gave for its conclusion was that criminal and civil trials involved different degrees of certainty; a civil litigant had a right to a jury verdict that only more probably than not corresponded with the truth while a criminal defendant had a right to a higher degree of certainty, that of being guilty beyond a reasonable doubt.³¹⁹ A part of the other, somewhat overlapping rationale, was that the danger that an appellate court would usurp the jury's function was less important in a civil case than in a criminal case.³²⁰ According to *Haddad*, the lower burden of proof in civil trials, a more probably than not standard, as opposed to the

³¹⁵ *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1458 n.7 (9th Cir. 1983); see TRAYNOR, *supra* note 10, at 29-30.

³¹⁶ *Haddad*, 720 F.2d at 1458-59.

³¹⁷ *Id.* at 1459.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

higher burden of proof in criminal trials, beyond a reasonable doubt, implied that a larger margin of error was tolerated in civil cases than in criminal cases.³²¹ Under this reasoning, requiring the winning party to show that the error below was only more probably than not harmless, and thus sustain the decision below, fit with the burden of proof at the trial level better than requiring the winning party to show that the error below was harmless beyond a reasonable doubt.

While this reasoning is attractive at first glance, it cannot be said that the attractiveness is not mainly due to its symmetry. In *McQueeney v. Wilmington Trust Co.*,³²² the Third Circuit similarly equated the lower burden of proof in a civil as opposed to a criminal trial to society's tolerance for lessened veracity in a civil trial context.³²³ This is where the Third and Ninth Circuits parted. The *McQueeney* court thought that the standard chosen was more about policy than a formulation of logic.³²⁴ The Third Circuit took an arguably broader multi-faceted approach in selecting its standard, referring to relevant statutory language, pragmatic concerns of implementation, and broad institutional concerns.³²⁵

Addressing the *Haddad* reasoning, the *McQueeney* court commented that the greater tolerance for error in civil trials as opposed to criminal trials did not mean that the tolerance of error should be extended to the appellate court in determining if a trial error was harmless.³²⁶ The Third Circuit reasoned that society had already agreed on a given margin of error in civil trials and to carry that margin of error over to an appellate review of whether an error was harmless was to enlarge that margin beyond society's expressed wishes.³²⁷ Additionally, the Third Circuit agreed that finding an error harmless required the appellate court to infringe on

³²¹ *Id.*

³²² 779 F.2d 916 (3d Cir. 1985).

³²³ *Id.* at 926.

³²⁴ *Id.*

³²⁵ *Id.* at 927.

³²⁶ *Id.* at 926.

³²⁷ *Id.*

the jury's function, but did not think this was any less important in a civil trial than in a criminal trial, reasoning that jurors conducted serious deliberations irrespective of the burden of proof.³²⁸ Indeed, the Third Circuit expressed the view that the infringement on the jury function rationale of the *Haddad* court amounted to finding that jury verdicts in civil trials were less worthy than those in criminal trials.³²⁹ Declining to adopt the reasoning in *Haddad*, the *McQueeney* court adopted a standard that reversal was required unless it was highly probable that the error was harmless.³³⁰

As an aside, the *McQueeney* court referred to the statement in *Chapman* expressing a possible equivalence of a beyond a reasonable doubt that an error was harmless standard to a reasonable possibility of harm standard, and questioned whether a standard of a high probability of harmlessness could equate to a standard expressed in terms of harm of some higher probability of harm than a reasonable possibility of harm standard.³³¹ Wisely, the Third Circuit recognized the perhaps futility of recasting the standard in different language.³³²

In *McQueeney*, just as in *Haddad*, the burden is on the party seeking to uphold the judgment below. As such, neither standard is applicable to veterans benefits law. But the multi-factorial approach of *McQueeney* in selecting a standard is more in keeping with the prejudicial error analysis demonstrated by the Court in *Shinseki*, than is the reasoning based largely on symmetry expressed in *Haddad*.

D. A Recommended Standard of Prejudice

Any standard will be sufficient to find that the claimant has not met his or her burden of showing prejudice if the record demonstrates that there was no prejudice. The three examples explained in

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 927.

³³¹ *Id.* at 927 n.19.

³³² *Id.*

Mayfield I and restated in the Federal Circuit’s decision in *Sanders v. Nicholson* are valid ways for the CAVC to determine from the record that a § 5103(a) error did not result in prejudice to the appellant. The remainder of this discussion assumes that there is not an affirmative showing in the record that the § 5103(a) error was harmless.

There is no reason for the CAVC to not now apply to all asserted § 5103(a) notice errors the requirements expressed in *Mayfield I* that the appellant must, with considerable specificity, identify the defect in the notice, what evidence the appellant would have provided or requested VA to obtain but for the defect, and how the lack of notice and evidence resulted in prejudice.³³³ Failure to meet any of these requirements would end the analysis with the error being deemed harmless. If the appellant satisfies those requirements, the analysis should proceed consistent with the case specific analysis conducted by the Court in *Shinseki*. Whatever standard of prejudice is chosen, it is clear that the CAVC is not limited in application of that standard to the facts found by the Board but rather must “review the record of the proceedings before the Secretary and the Board.”³³⁴ To do so is not a *Chenery* violation because whether an error is prejudicial is not a determination or judgment which VA alone is authorized to make.³³⁵ Indeed, it is the CAVC, not VA, to which Congress has assigned the task of determining whether an error is prejudicial.³³⁶

Moreover, the Court in *Shinseki* provided guidance as to the extent of review for determining if the error was prejudicial by its statement that “the specific factual circumstances in which the error arises may well make all the difference.”³³⁷ This strongly suggests that all circumstances as found in the record must be weighed to determine if the error was prejudicial to the appellant.

³³³ *Mayfield v. Nicholson*, 19 Vet. App. 103, 121 (2005).

³³⁴ *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) (citing 38 U.S.C. § 7261(b)(2) (2006)).

³³⁵ See *Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007).

³³⁶ *Id.*

³³⁷ *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009).

Certainly inappropriate would be a standard so lax that prejudice could be shown by an appellant's mere statement that but for the lack of notice the appellant would have obtained whatever evidence was lacking that caused the appeal to be denied. Such a standard would allow for remands in all cases of § 5103(a) errors and for all practical purposes, return the state of the law to that prior to *Shinseki*.

Employing the symmetry in *Haddad* to veterans law would yield a result contrary to the holding in *Shinseki*. Unlike more traditional civil proceedings, if the evidence favorable and unfavorable to a claim for VA benefits is in equipoise, the claim must be granted.³³⁸ In terms of the Ninth Circuit's analysis in *Haddad*, a burden that the appellant must only show by an equipoise standard that the error was harmless would amount to a presumption that the error was prejudicial, which would be contrary to the Court's holding in *Shinseki*. In terms of the Court's analysis in *O'Neal*, this would mean that if the CAVC was left in "grave doubt" due to the equipoise nature of the evidence of prejudice as opposed to harmlessness, the Board decision would be vacated and the matter remanded. But, following the explanation in *O'Neal*, this would place the burden on VA, and again, is contrary to the holding in *Shinseki*.

Although veterans benefits law is not typically expressed in terms of VA's burden to prove that the evidence is against granting a claim, in cases where the preponderance of the evidence is against granting the claim, the claim must be denied.³³⁹ However, this does not mean that the extent of the appellant's burden at the CAVC to show prejudice should be to a more probably than not standard. More in keeping with the tenor of the Court's decision in *Shinseki*, which stressed the many factors that go into harmless error analysis, is the reasoning of the Third Circuit in *McQueeney*.

³³⁸ 38 U.S.C. § 5107(b) (2006). This section provides that "[w]hen there is an approximate balance 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." *Id.*

³³⁹ *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990).

Militating against a standard that an error is prejudicial only if found to be so beyond a reasonable doubt are those considerations expressed in *Shinseki*. Although declining to specify a standard, the Court remarked that the non-adversarial nature of the proceedings at the agency level, the fact that the veteran is often unrepresented at that level, and the special solicitude expressed by Congress for the veterans' cause "might lead a reviewing court to consider harmful in a veteran's case error that it might consider harmless in other circumstances."³⁴⁰

The non-adversarial nature of the claims process also militates against a standard that prejudice be found if the error was only more likely than not prejudicial to the appellant. As demonstrated by Mr. Sanders's and Mrs. Mayfield's cases, the very nature of the claims and appeal process at the agency level, including that the record remains open throughout that process, will likely result in numerous reviews of the evidence in a system that requires only an equipoise showing of required elements in order for the claim to be granted. What can be a long process by its very nature, implies a system in which it is highly likely that, even in the absence of formal notice, a claimant will discover what is needed to substantiate the claim.

Additionally, allowing for too lax a standard will result in remands where the final outcome, as in Mr. Sanders's and Mrs. Mayfield's cases, will be no different than the initial RO decision but will consume extensive agency and judicial resources. If no other claimants were affected this would not be a factor; but that is not the case.³⁴¹ As in any system without unlimited resources, a claim is not immediately adjudicated upon receipt by the RO and

³⁴⁰ *Shinseki*, 129 S. Ct. at 1707.

³⁴¹ See INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 169 (2007), available at http://books.nap.edu/openbook.php?chapselect=yo&page=169&record_id=11885 (noting that VA received 806,000 claims relating to disabilities in fiscal year 2006); Bd. of VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2008 18 (2009), available at <http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf> (indicating that in fiscal year 2008, the Board received 40,916 cases for appellate consideration).

an appeal is not immediately adjudicated once it is certified to the Board. If claims that have already been decided at the RO level and appeals decided at the Board level must then be readjudicated following a remand from the CAVC, the time period is extended for those veterans and their families with meritorious claims who have not yet had their claims or appeals adjudicated. This negative impact upon those who have served this country will be an unintended but real consequence of a standard of prejudice that too easily allows for remands to the agency.

Taking these multiple factors into account, the standard of prejudice most appropriate to § 5103(a) errors is that there must be a high probability that the error resulted in prejudice to the appellant in order to vacate the Board decision and remand the matter for further attention. The advantage of the recommended formulation is that it is more in the traditional language of prejudicial error analysis and thus, perhaps, better informed by the history of such analysis. More importantly, this standard of prejudice provides for a balance in the consequences of prejudicial error analysis on those whose claims and appeals have already received considerable attention and those whose have not yet received such attention.

CONCLUSION

The U.S. Supreme Court's decision in *Shinseki* will result in better service to those who suffer from disabilities due to their military, naval, and air service to this country, and to their families. Errors in the notice provided to claimants, where those errors made no difference, can now be disregarded by the CAVC. However, *Shinseki* did not settle all of the questions that arise in determining whether an error in notice was or was not of any consequence. Still needed is the adoption of a standard for determining prejudice. This standard should be carefully chosen. It must neither be so demanding as to allow for errors in notice to go without correction when those errors are of consequence, nor so lax as to undo the

intended effect of the Court's decision in *Shinseki*. Taking all of the various factors into consideration, in order to find that a § 5103(a) notice error requires the agency to revisit the matter, it should be shown that there was a high probability that the error resulted in prejudice to the appellant. Such a standard will both protect those appellants who have had their appeals decided by the Board and minimize the time that those claimants and appellants must wait who have not yet had their claims and appeals reviewed.

