

The Veterans Claims Assistance Act of 2000: Ten Years Later

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“[T]he language of section 5103(a) has led to such a procedural quagmire that it is not fulfilling its intended benefit to VA claimants.”²

-Kerry Baker

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INTRODUCTION

Ten years ago, the Veterans Claims Assistance Act of 2000 (VCAA)³ was enacted into law, creating a landmark change in the Department of Veterans Affairs’ (VA’s) duties to notify and assist claimants for VA benefits. In turn, the United States Court of Appeals for Veterans Claims (CAVC) and United States Court of Appeals for the Federal Circuit (Federal Circuit) have issued several significant decisions interpreting the VCAA’s obligations upon VA and creating significant changes in VA’s claims adjudication process. In this Note, we intend to review the impact the VCAA and its interpretive case law has had on veterans’ benefits law over the past ten years. First, VA’s duties to claimants prior to the VCAA will be reviewed, followed by a discussion of the VCAA’s changes to VA’s duties to notify as interpreted by the courts. Finally, we will offer our own opinion regarding both the original goal of Congress in enacting the VCAA and how the courts could better meet that goal in the future.

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² S. REP. NO. 110-449, at 1730 (2008).

³ 38 U.S.C. §§ 5100, 5102-5103A, 5106-5107, 5126 (2006).

I. VA'S DUTIES PRIOR TO THE VCAA

Prior to the passage of the Veterans Judicial Review Act-Veterans' Benefits Improvement Act of 1988,⁴ the VA, then the Veterans Administration, made the final determinations related to veterans' benefits. These decisions were not subject to any judicial review. Congress expressly exempted VA determinations from judicial review:

[T]he decisions of the [Secretary] on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.⁵

This Board of Veterans' Appeals ("Board" or BVA) discretion was affirmed by the United States Supreme Court (Supreme Court) in *Johnson v. Robinson*,⁶ although such executive finality without judicial review continued to be questioned by veterans,⁷ veterans service organizations (VSOs) and legal scholars.⁸ Nevertheless, with this wide discretion, VA also developed a policy of "assist[ing] a claimant in developing the facts pertinent to the claim and . . . render[ing] a decision which grants every benefit that can be supported in law while protecting the interests of the Government. . . . [This policy applied] to all claims for benefits and relief."⁹

⁴ Pub. L. No. 100-687, 102 Stat. 4105.

⁵ 38 U.S.C. § 211(a) (1970).

⁶ 415 U.S. 361 (1974).

⁷ See *Moore v. Johnson*, 582 F.2d 1228 (9th Cir. 1978); *Anderson v. Veterans Admin.*, 559 F.2d 935 (5th Cir. 1977); *DeRodulfa v. U.S.*, 461 F.2d 1240 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 949 (1972).

⁸ See Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 *STAN. L. REV.* 905 (1975).

⁹ 38 C.F.R. § 3.103(a) (1995).

Although not codified by statute, Congress clearly recognized VA's policy of aiding all claimants to compile evidence in favor of their respective claims. In summarizing VA's action, Congress noted that upon receipt of a complete application for benefits, VA routinely requested (i) service treatment records, (ii) identified private treatment records, (iii) relevant statement(s) from fellow service members, and (iv) necessary medical examinations, at the government's expense.¹⁰ A claimant also was free to obtain assistance from VSOs or an attorney,¹¹ to aid in obtaining evidence, or undertaking other necessary efforts, to aid in substantiating a benefits claim.¹²

In spite of VA's routine efforts to aid in the development of benefits claims, the voices calling for judicial review of the administrative decisions continued to grow. The largest VSO, and by some accounts the first, in favor of establishing judicial review of VA benefits claims was the Vietnam Veterans of America (VVA); however, the move for judicial review, or allowing claimants "a day in court," was largely due to VVA's view that claims were being denied based on a bias against the Vietnam War by veterans working at VA.¹³ In response to efforts of VVA, veterans, and legal scholars, the Senate easily passed bills permitting judicial review of VA administrative decisions in the 96th, 97th, 98th, and 99th congressional sessions; however, such bills never made

¹⁰ H.R. REP. NO. 100-963, at 5795 (1988).

¹¹ *Id.* at 5797-98. The 1988 version of 38 U.S.C. § 3404(c) maintained the \$10 limit, established in 1936, for attorney and agent representation of a claimant seeking VA benefits. See 49 Stat. 2031 (1936). Congress's limitation of the fee an attorney could charge reflected the central belief that the VA benefits process is non-adversarial, that VA will aid claimants in every way possible to substantiate their claims and that VA will protect veterans from the predatory practices of unscrupulous claims agents and lawyers:

It is not the intent of Congress that these mercenary claim-agent leeches should sap the blood of any financial benefit from the Government by putting up these false claims and establishing their right to this 10 per cent commission for doing nothing, and doing what the Government itself intends to do in every individual case.

56 CONG. REC. 5222 (1918), *quoted in* H.R. REP. NO. 100-963, at 5798.

¹² Rabin, *supra* note 8, at 914-15.

¹³ See Lawrence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 162-63 (1992).

it out of the House Committee on Veterans' Affairs.¹⁴ After VVA's efforts gained support from other VSOs and the American public,¹⁵ the Senate¹⁶ and the House of Representatives¹⁷ passed the Veterans' Judicial Review Act-Veterans' Benefits Improvement Act of 1988,¹⁸ a bill establishing, as an Article I Court, the United States Court of Veterans Appeals (now CAVC)¹⁹ with exclusive jurisdiction over VA administrative benefits determinations.²⁰

Aside from creating the CAVC, the Veterans' Judicial Review Act-Veterans' Benefits Improvement Act of 1988 also codified and expanded "several existing [VA administrative] rules to reassure veterans that no change to those rules should be implied by other portions of the reported bill."²¹ Particularly, Congress placed upon a claimant "the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded,"²² and directed VA to assist the claimant in developing facts pertinent to the claim, including requesting information from other government agencies²³ or verifying other information pertinent to the claim (e.g., obtaining a VA medical examination, relevant lay statements and medical treatment records).²⁴ Congress also expanded VA's ability to obtain independent medical opinions in complex matters, a power that previously had been vested solely in the BVA.²⁵ Looking to the

¹⁴ *See id.* at 156.

¹⁵ *See id.* at 163-65.

¹⁶ S. 11, 100th Cong. (as passed by the Senate July 11, 1988).

¹⁷ H.R. 5288, 100th Cong. (as passed by the House of Representatives Oct. 5, 1988).

¹⁸ Pub. L. No. 100-687, 102 Stat. 4105 (1988).

¹⁹ "There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals." *Id.* at §§ 301(a), 4051.

²⁰ *Id.* at § 4052; *see also* 38 U.S.C. § 7252(a) (1988).

²¹ H.R. REP. NO. 100-963, at 5789 (1988).

²² 38 U.S.C. § 5107(a) (1991).

²³ "The head of any Federal department or agency shall provide such information to the Administrator as he may request for purposes of determining eligibility for or amount of benefits, or verifying other information with respect thereto." 38 U.S.C. § 5106 (1991).

²⁴ *Id.* § 5109; *see also id.* § 5106; H.R. REP. NO. 100-963, at 5795.

²⁵ H.R. REP. NO. 100-963, at 5790.

text of the Act and its related report, it becomes clear that Congress intended for VA to continue assisting claimants to develop their benefits claims, as had been customary throughout the agency's history.²⁶

Now empowered to review VA benefits determinations, the newly minted CAVC worked to define the legal standards for VA's duty-to-assist. In *Murphy v. Derwinski*,²⁷ the CAVC defined a "well grounded" claim, generally as "a plausible claim . . . meritorious on its own or capable of substantiation[,] . . . [which] need not be conclusive but only possible."²⁸ Placing the "well grounded" standard in context, the CAVC further declared that upon receipt of a complete form for benefits:

[VA had the claimant's] biographical, family, medical, and service data . . . [allowing the VA] to fulfill [the] statutory duty to assist the claimant by securing any relevant VA, military or other governmental records. In addition, if private medical, hospital, employment or other civilian records would assist the development of "the facts pertinent to the claim," [VA] would be able to request them from the claimant or, upon authorization, obtain them directly.²⁹

Although the CAVC seemed to provide a common-sense definition for the duty-to-assist already undertaken by VA, the CAVC in fact was moving to narrow VA's general practices.

In *Tirpak v. Derwinski*,³⁰ the CAVC went on to characterize well-groundedness as "an objective [test] which explores the likelihood of prevailing on the claim."³¹ The CAVC then held

²⁶ *Id.*

²⁷ 1 Vet. App. 78 (1990).

²⁸ *Id.* at 81.

²⁹ *Id.* at 82.

³⁰ 2 Vet. App. 609 (1992).

³¹ *Id.* at 611; *see also* Caluza v. Brown, 7 Vet. App. 498, 506 (1995) (holding that a well

in *Proscelle v. Derwinski*³² that in the case of an increased rating claim, a claimant's lay contention that a service-connected disability had worsened was sufficient to render such a claim well-grounded.³³ These decisions became particularly important, as the CAVC began to narrow VA's ability to assist a claimant in developing a claim by requiring that the claimant make a showing that the submitted claim was well grounded, prior to VA being able to provide any development assistance.

The CAVC opinion in *Grivois v. Brown*³⁴ is also illustrative of the CAVC view of when VA should undertake efforts to assist a claimant to develop a particular claim. In this case, the CAVC addressed the appellant's multiple service connection claims, including for dysthymic disorder and hearing loss.³⁵ The Board had determined that all of the Veteran's service connection claims were well grounded, but upon addressing the merits each claim was ultimately denied.³⁶ Upon reviewing the record, the CAVC found no rationale to support the Board's determination that each of the Veteran's claims was well grounded.³⁷ Examining the Board's determinations on a *de novo* basis, the CAVC found the Veteran failed to submit a claim with evidence suggesting a link between his dysthymic disorder and military service or that he was treated for hearing loss prior to the first noted treatment fifteen years after his separation from service.³⁸ Based on these findings the CAVC found that the Veteran's claims were not well grounded, noting that "a record which, despite the initial failure of [the Veteran] to present evidence of medical causality as to the

grounded claim requires (i) medical evidence of a current disability; (ii) medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (iii) medical evidence of a nexus between the asserted in-service injury or disease and a current disability).

³² 2 Vet. App. 629 (1992).

³³ *Id.* at 632.

³⁴ 6 Vet. App. 136 (1994).

³⁵ *Id.* at 139.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

claimed hearing loss and ‘nervous condition,’ reflects indulgence of that failure and a voluntary effort by [VA] to supply the needed evidence.”³⁹

The CAVC also emphasized the following:

Section 5107(a) of title 38 unequivocally places an initial burden on a claimant to produce evidence that the claim is well grounded or, as we have held, is plausible. This statutory prerequisite reflects a policy that implausible claims should not consume the limited resources of the VA and force into even greater backlog and delay those claims which—as well grounded—require adjudication. This policy is starkly clear when one reads the specific reiteration of that requirement in § 5107(b) of title 38. There it is seen that in adopting the benefit of the doubt rule, the claimant is still not relieved of the initial burden of presenting evidence of plausibility: “Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden specified in subsection (a) of this section.” Attentiveness to this threshold issue is, by law, not only for the Board but for the initial adjudicators, for it is their duty to avoid adjudicating implausible claims at the expense of delaying well-grounded ones.⁴⁰

The CAVC was sending a message to VA that not all claims triggered VA’s duty-to-assist and that VA should first determine if a claim was well grounded before undertaking any efforts to assist the claimant. Although in *Grivois* the CAVC urged VA not to assist in the development of any claims where the claimant had not submitted sufficient evidence to establish a well grounded claim,

³⁹ *Id.* at 140.

⁴⁰ *Id.* at 139 (citations omitted).

the CAVC refrained from making such a proclamation.⁴¹ However, the CAVC did state that were VA to adopt a policy of assisting all claimants, no matter if the claim were well grounded or not, “grave questions of due process” would be implicated.⁴² The interpretation that a claim must first be found well grounded before VA should assist in the development of a claim was also adopted by the Federal Circuit.⁴³

Three years after this decision, in *Morton v. West*,⁴⁴ the CAVC moved explicitly to prevent VA from aiding in the development of claims that were not well grounded. In this case, VA denied the Veteran’s service connection claims finding the claims not well grounded, but the appellant argued VA had an obligation to assist him in developing facts relevant to his claim, even if the claim was not well grounded.⁴⁵ More specifically, the *Morton* appellant argued that based on internal manuals and regulations, VA had taken on a duty-to-assist all claimants in developing their claims.⁴⁶ Again looking to the text of 38 U.S.C. § 5107(a), the CAVC stated there was “a Congressional intent to create a chronological process whereby appellants who have met the requisite [well grounded] burden, and only those appellants, are entitled to the benefit of VA’s duty to assist.”⁴⁷

The CAVC then addressed whether *VA Manual M21-1* provisions, certain VA policies, and VA regulations issued by the Secretary, could eliminate the threshold requirement that a claimant submit a well-grounded claim and provide assistance to all claimants.⁴⁸ Citing a litany of Supreme Court decisions, the CAVC found that to the extent any VA regulation required, or permitted,

⁴¹ *Id.*

⁴² *Id.* at 140.

⁴³ See *Epps v. Gober*, 126 F.3d 1464 (Fed. Cir. 1997).

⁴⁴ 12 Vet. App. 477 (1999), *opinion withdrawn by Morton v. West*, 14 Vet. App. 174 (2000).

⁴⁵ *Id.* at 479.

⁴⁶ *Id.* at 479-80.

⁴⁷ *Id.* at 480.

⁴⁸ *Id.* at 481.

VA to assist a claimant, prior to the submission of a well grounded claim it was against the plain language of the applicable statute.⁴⁹ Accordingly, the CAVC ruled that “absent the submission and establishment of a well-grounded claim, [VA] cannot undertake to assist a veteran in developing facts pertinent to his or her claim.”⁵⁰ This landmark decision brought to an end VA’s long history of assisting claimants in obtaining records and documents pertinent to the submitted claim and would change VA’s role in the development of claims significantly.

After the CAVC rendered its decision in *Morton*, Congress acted quickly to reestablish VA’s ability to assist claimants to develop their respective claims. Taking direct aim at the *Morton* decision, the Senate Committee on Veterans’ Affairs noted the following:

The “well groundedness” and “duty to assist” concepts, when they were codified, had meaning in prior VA regulations and practice. As a consequence of that fact, [the concepts] were applied by VA, after codification, in a manner that was consistent with past practice, rather than in a manner which might have better conformed to [the CAVC’s] later interpretation of the strict terms of the statute. As in the past, VA continued to assist veterans and claimants by gathering military service records, VA and private medical records, other relevant private and governmental evidence, and, when appropriate, by providing medical examinations. But VA did not, as a threshold matter, require that claimants submit evidence necessary to establish “well groundedness” before it would render such assistance.⁵¹

⁴⁹ *Id.* at 481-85.

⁵⁰ *Id.* at 486.

⁵¹ S. REP. NO. 106-397, at 24 (2000). *See* 38 U.S.C. § 5103A(g) (2000) (stating that the ability to assist a claimant is not limited to these areas, as Congress provided VA with the latitude to provide “other assistance . . . to a claimant in substantiating a claim as [VA] considers appropriate”).

Essentially, Congress sought to alter the landscape created by *Morton* and return VA's ability to assist all claimants, without any requirement that the claim be "well grounded,"⁵² as VA had done prior to the CAVC decisions constraining this ability.⁵³ More pointedly, Congress viewed the standard imposed on VA, before development was undertaken, as contrary to the mission and non-adversarial nature of VA benefits claims.⁵⁴ Congress further noted that, in an effort to conform with both its mission to assist claimants and the standards outlined by the CAVC, VA "revised internal procedure manual provisions and continued to operate and adjudicate claims in a manner which delayed a decision on 'well groundedness' until a claim had been fully developed," believing 38 U.S.C. § 5107(a) did not prohibit voluntary assistance to claimants.⁵⁵ However, such deliberate action was made impermissible by *Morton*, which Congress viewed as improper. In crafting legislation to deal directly with *Morton*, Congress started by declaring that VA's "duty to assist" has been construed in many ways, "but the goal *is and has been to assist veterans in developing claims* and receiving benefits for which they are eligible."⁵⁶

⁵² Notably, while dissatisfaction was percolating in Congress, the United States Court of Appeals for the Federal Circuit (Federal Circuit) was also actively reexamining the well grounded standard; however, any action on such examination was rendered moot with relevant Congressional action. See *Hensley v. West*, 212 F.3d 1255, 1259 (Fed. Cir. 2000); see also *Brock v. Gober*, 222 F.3d 988 (Fed. Cir. 2000).

⁵³ *Id.*; see, e.g., *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995) (holding that a well grounded claim requires (i) medical evidence of a current disability; (ii) medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (iii) medical evidence of a nexus between the asserted in-service injury or disease and a current disability); *Grivois v. Brown*, 6 Vet. App. 136, 139 (1994) (admonishing VA for developing claims that were not initially determined to be well grounded); *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990) (holding that § 5107(a) established a chronological obligation, requiring a claimant to submit a well grounded or "facially valid" claim before VA was obligated to assist in developing the claim).

⁵⁴ H.R. REP. NO. 106-781, at 7-9 (2000) (taking particular issue with the *Grivois* case, as numerous decisions of the United States Court of Appeals for Veterans Claims (CAVC) resulted in an understanding that a "well grounded" claim required a claimant to present medical evidence relating a particular medical condition to military service, and without evidence of this nature "the claim 'was not one which relief could be granted; there is no claim to adjudicate on its merits'").

⁵⁵ *Id.* at 8 (citing the *Duty to Assist Veterans Act of 1999: Hearing on H.R. 3193 Before the Subcomm. on Benefits of the H. Veterans' Affairs Comm.*, 106th Cong. 1-092 (2000) (statement of Joseph Thompson, Undersec'y for Benefits, Dep't of Veterans Affairs)).

⁵⁶ *Id.* at 9 (emphasis added).

Both the House and Senate drafted bills that appeared to limit the CAVC's ability to prevent VA from assisting a claimant in developing a claim for benefits. In pertinent part, the House draft bill provided:

(a) Duty To Assist.—[VA] shall make reasonable efforts to assist in obtaining evidence necessary to establish a claimant's eligibility for a benefit under a law administered by [VA]. However, [VA] may decide a claim without providing assistance under this subsection when no reasonable possibility exists that such assistance will aid in the establishment of eligibility for the benefit sought.

(b) Assistance in Obtaining Records.—

(1) As part of the assistance provided under subsection (a), [VA] shall make reasonable efforts to obtain relevant records that the claimant adequately identifies to [VA] and authorizes [VA] to obtain.

(2) Whenever [VA], after making such reasonable efforts, is unable to obtain all of the records sought, [VA] shall inform the claimant that [VA] is unable to obtain such records⁵⁷

Concurrently, the Senate drafted language to define VA's duty-to-assist, which provided:

(a) Except as provided in subsection (b), [VA] shall make reasonable efforts to assist in the development of information and medical or lay evidence

⁵⁷ *Id.* at 2.

necessary to establish the eligibility of a claimant for benefits under the laws administered by the Secretary.

(b) [VA] is not required to provide assistance to a claimant under subsection (a) if no reasonable possibility exists, as determined in accordance with regulations prescribed under subsection (f), that such assistance would aid in the establishment of the eligibility of the claimant for benefits under the laws administered by the Secretary.

(c) In any claim for benefits under the laws administered by [VA], the assistance provided by the Secretary under subsection (a) shall include the following:

(1) Informing the claimant and the claimant's representative, if any, of the information and medical or lay evidence needed in order to aid in the establishment of the eligibility of the claimant for benefits under the laws administered by the Secretary.

(2) Informing the claimant and the claimant's representative, if any, if the Secretary is unable to obtain any information or medical or lay evidence described in paragraph (1).⁵⁸

Examining the language of both legislative drafts, Congress's intent to permit VA to continue assisting claimants in developing their claim seems evident. In fact, at a hearing before the Senate

⁵⁸ S. REP. NO. 106-397, at 2-3 (2000).

Committee on Veterans' Affairs, Joseph Thompson, VA's Under Secretary for Benefits, expressed approval of congressional efforts to roll-back the limitations imposed on VA's ability to assist all claimants and urged Congress to adopt measures that would limit the need of the CAVC to interpret VA's duty-to-assist obligations.⁵⁹ More specifically, the Under Secretary for Benefits expressed approval of the Senate draft, as it provided specific requirements related to both assistance and notice.⁶⁰

After reconciling both the House and Senate bills, Congress passed the VCAA.⁶¹ The enacted version of the VCAA adopted notice and assistance provisions from both the House and Senate bills and read as follows:

§ 5103. Notice to claimants of required information and evidence

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

⁵⁹ *Veterans Programs Enhancement Act of 2000: Hearing on S. 1810 Before the S. Comm. on Veterans' Affairs*, 106th Cong. 50-51 (2000) (statement of Joseph Thompson, Undersecretary for Benefits, Dept't of Veterans Affairs).

⁶⁰ *Id.*

⁶¹ Pub. L. No. 106-475, 114 Stat. 2096 (2000) (codified as amended at 38 U.S.C. §§ 5100-5107 (2000)).

(b) TIME LIMITATION.—

(1) In the case of information or evidence that the claimant is notified under subsection (a) is to be provided by the claimant, if such information or evidence is not received by the Secretary within 1 year from the date of such notification, no benefit may be paid or furnished by reason of the claimant's application.

(2) This subsection shall not apply to any application or claim for Government life insurance benefits.

§ 5103A. Duty to assist claimants

(a) DUTY TO ASSIST.—

(1) The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.

(2) The Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim.

(3) The Secretary may defer providing assistance under this section pending the submission by the claimant of essential information missing from the claimant's application.

(b) ASSISTANCE IN OBTAINING RECORDS.—

(1) As part of the assistance provided under subsection (a), the Secretary shall make reasonable efforts to obtain relevant records (including private records) that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain.

(2) Whenever the Secretary, after making such reasonable efforts, is unable to obtain all of the relevant records sought, the Secretary shall notify the claimant that the Secretary is unable to obtain records with respect to the claim.⁶²

The passage of the VCAA reflected congressional intent to return to a pre-*Morton* VA, where VA utilized resources to assist a claimant in substantiating a benefits claim.

So strong was the desire to return to a pre-*Morton* VA benefits scheme that Congress added retroactive provisions to the VCAA. Specifically, Congress made the VCAA applicable to claims for VA benefits that were filed “on or after the date” the VCAA was passed, as well as those claims currently pending before VA.⁶³ Additionally, Congress made the VCAA retroactive with respect to claims denied after the CAVC’s decision in *Morton*:

§ 7 Effective Date

.....

⁶² *Id.* § 3, 114 Stat. at 2096-98.

⁶³ *Id.* § 7, 114 Stat. at 2099.

(b) RULE FOR CLAIMS THE DENIAL OF WHICH BECAME FINAL AFTER THE COURT OF APPEALS FOR VETERANS CLAIMS DECISION IN THE MORTON CASE.—

(1) In the case of a claim for benefits denied or dismissed as described in paragraph (2), the Secretary of Veterans Affairs shall, upon the request of the claimant or on the Secretary's own motion, order the claim readjudicated under chapter 51 of such title, as amended by this Act, as if the denial or dismissal had not been made.

(2) A denial or dismissal described in this paragraph is a denial or dismissal of a claim for a benefit under the laws administered by the Secretary of Veterans Affairs that—

(A) became final during the period beginning on July 14, 1999, and ending on the date of the enactment of this Act; and

(B) was issued by the Secretary of Veterans Affairs or a court because the claim was not well grounded (as that term was used in section 5107(a) of title 38, United States Code, as in effect during that period).

(3) A claim may not be readjudicated under this subsection unless a request for readjudication is filed by the claimant, or a motion is made by the Secretary, not later than 2 years after the date of the enactment of this Act.

(4) In the absence of a timely request of a claimant under paragraph (3), nothing in this Act shall be construed as establishing a duty on the part of the Secretary of Veterans Affairs to locate and readjudicate a claim described in this subsection.⁶⁴

With the passage of this provision, Congress made clear that no denial of VA benefits subsequent to *Morton* and prior to the date the VCAA was passed was a final decision. Significantly, for claims within this category, the claimant need not present “new and material” evidence⁶⁵ to reopen the denied claim and VA

⁶⁴ *Id.*

⁶⁵ 38 C.F.R. § 3.156(a) (1999) (providing that in order for a claimant to reopen a previously-denied claim, he must submit new and material evidence, meaning “evidence not previously submitted to agency decisionmakers which bears directly and substantially upon the specific matter under consideration, which is neither cumulative nor redundant, and which by itself or in connection with evidence previously assembled is so significant that it must be considered in order to fairly decide the merits of the claim”); *see* 38 U.S.C. § 5108 (1999).

(a) New and material evidence means evidence not previously submitted to agency decisionmakers which bears directly and substantially upon the specific matter under consideration, which is neither cumulative nor redundant, and which by itself or in connection with evidence previously assembled is so significant that it must be considered in order to fairly decide the merits of the claim.

(b) New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of § 20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

(c) Where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be reconsidered by the adjudicating agency of original jurisdiction. This comprehends official service department records which presumably have been misplaced and have now been located and forwarded to the Department of Veterans Affairs. Also included are corrections by the service department of former errors of commission or omission in the preparation of the prior report or reports and identified as

was to readjudicate the claim as if it were an original claim for benefits.⁶⁶

II. THE VCAA AND JUDICIAL INTERPRETATION

A. Applicability of the VCAA

Almost immediately upon its enactment, the VCAA became a subject of judicial scrutiny before the CAVC.⁶⁷ Among the first issues the CAVC had to consider was the applicability of the VCAA in specific cases.⁶⁸ The CAVC's response was to begin carving out exemptions to the reach of the VCAA. In *Smith v. Gober*,⁶⁹ the appellant sought payment of accrued interest from an award of past-due disability benefits,⁷⁰ based either on explicit statutory authority or equitable relief.⁷¹ In denying such a claim, the CAVC noted, albeit only in passing, that the VCAA “does not

such. The retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly except as it may be affected by the filing date of the original claim.

38 C.F.R. § 3.156(a) (1999).

⁶⁶ Pub. L. No. 106-475, § 7, 114 Stat. 2096, 2099-100 (2000). Section 7 of this statute not only affected how VA was to adjudicate claims which were denied after *Morton* and before the passage of the VCAA, but also presented issues regarding the appropriate effective date of benefits. *Id.* For claims that fit within this category the effective date for these claims would remain the date VA received the claim or the date entitlement arose, whichever was later. *Id.* The effective date of a previously-denied claim that was not final would be the date the claim denied under *Morton* was filed. *Id.*

⁶⁷ *Luyster v. Gober*, 14 Vet. App. 186 (2000) (citing to the VCAA on November 20, 2000, less than two weeks after the VCAA became effective).

⁶⁸ *See, e.g., Patek v. Gober*, 14 Vet. App. 233 (2001) (ordering the appellant to address VCAA applicability to her application to reopen a service connection claim); *Tellex v. Gober*, 14 Vet. App. 196, 196-97 (2000) (ordering VA to file a memorandum addressing the applicability of the VCAA to a claim for reimbursement of unauthorized medical expenses); *Gordon v. Gober*, 14 Vet. App. 193, 194-95 (2000) (ordering VA to address VCAA applicability to a request for waiver of overpayment).

⁶⁹ 14 Vet. App. 227 (2000).

⁷⁰ *Id.* at 228-29.

⁷¹ *Id.* at 230-31.

affect the issue decided in this case concerning whether a federal statute allows payment of interest on past due benefits,”⁷² without providing further analysis or explanation for this finding.

Subsequently, in *Holliday v. Principi*,⁷³ the CAVC expanded on its finding in *Smith*, noting that the *Smith* case involved a claim for interest payments, which “the [CAVC] could not, as a matter of law, require the Secretary to award.”⁷⁴ Because the claim in *Smith* was not, on its face, a valid claim within the VA benefits scheme, the VCAA did not apply.⁷⁵ By contrast, the issue in *Holliday*, of entitlement to increased ratings for various service-connected disabilities, was on its face a valid claim for VA benefits, and as such, the VCAA was applicable, and the two cases were distinguishable.⁷⁶

In the case of *Livesay v. Principi*,⁷⁷ the CAVC embarked on a more extensive foray into the applicability of the VCAA.⁷⁸ *Livesay* involved claims of clear and unmistakable error (CUE) in prior 1985 and 1987 BVA determinations.⁷⁹ In such claims, it is a well-settled principle that the error must be based upon the record as it existed at the time the decision in which CUE is alleged was issued.⁸⁰ The CAVC first noted that although the VCAA was “*potentially* applicable” to all claims, its applicability was not without exceptions, as in *Smith*.⁸¹ Generally, VA was responsible for deciding in the first instance whether the VCAA applied to a pending claim; however, in cases such as *Smith*, where “the VCAA can have *no* application as a matter of law,

⁷² *Id.* at 231-32.

⁷³ 14 Vet. App. 327 (2001).

⁷⁴ *Id.* at 328.

⁷⁵ *Id.*

⁷⁶ *Id.* at 328-29.

⁷⁷ 15 Vet. App. 165 (2001).

⁷⁸ *Id.* at 178-79.

⁷⁹ *Id.* at 168.

⁸⁰ *Id.* at 178 (citing *Fugo v. Brown*, 6 Vet. App. 40, 43 (1993)).

⁸¹ *Id.*

this Court not only may, but most so hold.”⁸² Turning then to the CUE claim, the CAVC found that the VCAA was not applicable.⁸³ The CAVC declared that a CUE claim was “fundamentally different from any other kind of action in the VA adjudicative process,”⁸⁴ as the applicant was seeking revision or reversal of a prior determination, not a benefit in and of itself.⁸⁵ Therefore, the applicant alleging CUE was not seeking benefits under Parts II or III of Title 38 of the U.S. Code and was not a “claimant,” as defined by applicable sections of the VCAA, and the VCAA did not apply.⁸⁶ Although *Livesay* involved an allegation of CUE in a prior Board decision, the CAVC subsequently extended this holding to allegations of CUE in prior RO decisions, again finding that CUE claims were not subject to the VCAA in such cases.⁸⁷

In *Barger v. Principi*,⁸⁸ the CAVC addressed the applicability of the VCAA in the context a claim for waiver of recovery of overpayment of improved death pension benefits. In this instance, the CAVC again declared the VCAA inapplicable, as requests for waiver of overpayment were governed by 38 U.S.C. § 5302, a statute which not only contained its own notice provisions, but was also outside the scope of the VCAA, not being within Chapter 51 of Title 38.⁸⁹ The CAVC went on in *Lueras v. Principi*⁹⁰ to explain that an applicant for waiver of overpayment under 38 U.S.C. § 5302 was not seeking a benefit as defined by Chapter 51.⁹¹ Akin to the reasoning applied in *Livesay*, the CAVC thus found in *Lueras* that an applicant for waiver was not a “claimant,” for whom VCAA notice and assistance applied.⁹²

⁸² *Id.* (emphasis added).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 178-79.

⁸⁶ *Id.* at 179.

⁸⁷ *Parker v. Principi*, 15 Vet. App. 407, 412 (2002).

⁸⁸ 16 Vet. App. 132 (2002).

⁸⁹ *Id.* at 138.

⁹⁰ 18 Vet. App. 435 (2004).

⁹¹ *Id.* at 438.

⁹² *Id.* at 438-39.

In *Sims v. Nicholson*,⁹³ the CAVC further extended the *Livesay* holding to applications for the restoration of competency for the receipt of VA financial benefits.⁹⁴ In a matter where an applicant simply sought to be declared competent, the CAVC noted that the applicant was “not seeking benefits under chapter 51, but, rather, is seeking a decision regarding how his benefits will be distributed under chapter 55,” making the notice and assistance provisions of the VCAA inapplicable.⁹⁵

Early on the CAVC also confronted whether the VCAA applied to applications to reopen previously- and finally-denied claims under 38 U.S.C. § 5108.⁹⁶ In addressing this issue in *Quartuccio v. Principi*,⁹⁷ the CAVC noted first that it had held prior to the VCAA that “[a] veteran filing an original claim for benefits and a veteran attempting to reopen his claim are both claimants making an ‘application for benefits’” under applicable law.⁹⁸ Because “[t]he intent of Congress . . . was to expand the duties of the Secretary to notify the claimant, not to restrict them,”⁹⁹ and the plain language of the VCAA did not otherwise suggest against such a result, the CAVC extended its prior holding to include claimants seeking to reopen claims for benefits as subject to the VCAA.¹⁰⁰

Since its enactment, the CAVC has continued to address questions of the applicability of the VCAA, finding it applicable to dependency and indemnity compensation (DIC) claims filed by surviving spouses,¹⁰¹ and claims for National Service Life Insurance policy benefits,¹⁰² and no doubt will continue to address such questions in the future.

⁹³ 19 Vet. App. 453 (2006).

⁹⁴ *Id.* at 456.

⁹⁵ *Id.*

⁹⁶ *Quartuccio v. Principi*, 16 Vet. App. 183 (2002).

⁹⁷ *Id.*

⁹⁸ *Id.* at 186 (quoting *Graves v. Brown*, 8 Vet. App. 522, 524 (1996)).

⁹⁹ *Id.* at 186-87.

¹⁰⁰ *Id.* at 187.

¹⁰¹ *Sachs v. Principi*, 14 Vet. App. 298 (2001).

¹⁰² *Gordon v. Nicholson*, 21 Vet. App. 270 (2007).

B. VA Regulations Promulgated under the VCAA

Pursuant to statutory edict, the Secretary of VA was tasked with prescribing rules and regulations to carry out the requirements of the VCAA.¹⁰³ A notice of proposed rulemaking was published on April 4, 2001¹⁰⁴ and a final rulemaking was published on August 29, 2001.¹⁰⁵ The final regulations were made effective retroactively from November 9, 2000.¹⁰⁶ They were soon subject to legal challenge in *Paralyzed Veterans of America (PVA) v. Secretary of Veterans Affairs*.¹⁰⁷ Because the challenge was to VA's procedural and substantive regulations implementing the VCAA, and the process by which these regulations were created, the action bypassed CAVC review and was heard before the Federal Circuit.¹⁰⁸ The Federal Circuit first noted that the appropriate standard of review was whether VA's actions were "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law,"¹⁰⁹ a standard which is "'highly deferential' to the actions of the agency."¹¹⁰ Utilizing this standard, the Federal Circuit determined the challenged regulations were appropriate implementations of the VCAA, with one exception—the Federal Circuit concluded 38 C.F.R. § 3.159(b)(1), which allowed VA to decide a pending claim 30 days after a claimant was provided notice under 38 U.S.C. § 5103(a) of any additional medical or lay evidence necessary to decide the claim, "not only fail[ed] to promote efficiency, but ensure[d] confusion and inefficiency, and [was] potentially prejudicial to [a] claimant's statutory one-year period for providing information."¹¹¹

¹⁰³ 38 U.S.C. §§ 501(a), 5103A(e) (2006).

¹⁰⁴ Duty to Assist, 66 Fed. Reg. 17,834 (proposed Apr. 4, 2001) (to be codified at 38 C.F.R. pt. 3).

¹⁰⁵ Duty to Assist, 66 Fed. Reg. 45,620 (Aug. 29, 2001).

¹⁰⁶ *Id.*

¹⁰⁷ 345 F.3d 1334 (Fed. Cir. 2003).

¹⁰⁸ *See* 38 U.S.C. § 502 (2006).

¹⁰⁹ *Paralyzed Veterans of Am.*, 345 F.3d at 1339 (citing the Administrative Procedure Act, 5 U.S.C. §§ 701-706).

¹¹⁰ *Id.* at 1340 (citing Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1372 (Fed. Cir. 2001)).

¹¹¹ *Id.* at 1346.

VA also had attempted to address the backlog of claims and reduce the number of appeals remanded by the BVA by proposing regulations allowing the BVA to obtain evidence, clarify the evidence, cure a procedural defect, or perform related actions necessary to adjudicate a claim without remanding it to the RO.¹¹² These proposed regulations were published by VA in final form on January 23, 2002, becoming effective February 22, 2002 and applicable to new claims and those already pending before the BVA.¹¹³ These regulations were quickly subject to legal challenge when a group of VSOs challenged them before the Federal Circuit.

In *Disabled American Veterans (DAV) v. Secretary of Veterans Affairs*,¹¹⁴ the appellants challenged not only VA's regulations, but also their retroactive effect.¹¹⁵ In this case, the Federal Circuit, applying the standard of review enunciated in *PVA*, considered whether proper legal procedures were followed in the proposal and implementation of the regulations.¹¹⁶

As an initial matter, the Federal Circuit found “meritless” any contention that VA could not apply the regulations to appeals pending prior to the date the regulations became effective.¹¹⁷ The Federal Circuit reached this conclusion because the regulations did not “alter[] the parties’ substantive rights nor create[] new legal obligations or liabilities;”¹¹⁸ rather, the regulations merely addressed “whether the Board may obtain evidence on behalf of a claimant or adjudicate the effect of a law not previously considered.”¹¹⁹ Thus, the Federal Circuit construed the regulations as merely jurisdictional in nature, modifying only the tribunal

¹¹² Obtaining Evidence and Curing Procedural Defects Without Remanding, 66 Fed. Reg. 40,942 (proposed Aug. 6, 2001) (to be codified at 38 C.F.R. pt. 19).

¹¹³ Obtaining Evidence and Curing Procedural Defects Without Remanding, 67 Fed. Reg. 3099 (Jan. 23, 2002).

¹¹⁴ 327 F.3d 1339 (Fed. Cir. 2003).

¹¹⁵ *Id.* at 1344-45.

¹¹⁶ *Id.* at 1343-44.

¹¹⁷ *Id.* at 1344.

¹¹⁸ *Id.* at 1345.

¹¹⁹ *Id.* at 1344-45.

which would hear the claim, and not the substantive rights of the claimant.¹²⁰ Such regulations did not run afoul of the Supreme Court's usual prohibition on statutory retroactive effect, unless expressly intended by Congress.¹²¹ If VA's regulations were deemed valid, they would be effective as to pending appeals.¹²²

Turning then to consider the regulations themselves, the Federal Circuit found VA exceeded its statutory authority by allowing BVA within 38 C.F.R. § 19.9(a) to obtain and consider additional evidence directly, without either initial consideration by the agency of original jurisdiction, or waiver of such consideration by the claimant.¹²³ BVA was by its nature an appellate review panel, and in reviewing evidence not considered by the agency of original jurisdiction, it was depriving claimants of their "one review on appeal to the Secretary."¹²⁴ Because no tribunal existed above BVA within VA, the claimant had no avenue of appeal to the Secretary should BVA deny the benefit on initial review.¹²⁵ The Federal Circuit found no indication within the VCAA, or any related legislation, that Congress intended to obviate or bypass the "one review on appeal to the Secretary" rule of 38 U.S.C. § 7104(a).¹²⁶ The Federal Circuit also invalidated 38 C.F.R. § 19.9(a)(2)(ii), which provided 30 days for claimants to respond to any notification action by BVA under 38 U.S.C. § 5103(a), observing that while the 30-day stipulation did not expressly overrule § 5103(b)'s one-year time limit to respond to a VA request for additional evidence, it was nonetheless a "misleading characterization of the law."¹²⁷ The Federal Circuit further observed that 38 C.F.R. § 19.9(a)(2)(ii) expressly authorized referral of any additional evidence received to the agency of

¹²⁰ *Id.*

¹²¹ *Id.* (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272-73 (1994)).

¹²² *Id.* at 1345.

¹²³ *Id.* at 1345-48.

¹²⁴ *Id.* at 1347 (citing 38 U.S.C. § 7104(a)).

¹²⁵ *Id.*

¹²⁶ *Id.* at 1347-48.

¹²⁷ *Id.* at 1348.

original jurisdiction if received after a claimed benefit was denied by BVA, with an effective date to be assigned, if the claim was granted, as if the benefit had been granted by the Board at the time notice was provided.¹²⁸ Nevertheless, this provision did not correct the effect of the 30-day time limit and served as a “misleading hurdle to the claimant,” who might not be aware that he still had up to a year to file additional evidence under 38 U.S.C. § 5103(b).¹²⁹

While the Federal Circuit found the remainder of VA’s proposed regulations to be valid, the *DAV* decision, by striking down BVA’s authority to consider and develop additional evidence on an initial basis without waiver by the claimant of agency of original jurisdiction consideration, ended that effort by VA to address its appellate backlog and speed up the claims process.¹³⁰

C. Clarifying VA’s Duties to Notify under the VCAA

Along with addressing the scope of the VCAA and the validity of the regulations enacted to implement it, the courts were to be called upon to clarify such topics as the timing¹³¹ and content¹³² of appropriate VCAA notice. The *Quartuccio* case, cited above, further spelled out VA’s notice duties under the VCAA.¹³³ The CAVC established that proper VCAA notice must (1) inform the claimant of the information and evidence not of record that is necessary to substantiate the claim; (2) inform the claimant of the information and evidence that VA will seek to provide; and (3) inform the claimant of the information and evidence the claimant is expected to provide.¹³⁴

¹²⁸ *Id.* at 1349.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1354.

¹³¹ *See* *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

¹³² *See* *Quartuccio v. Principi*, 16 Vet. App. 183 (2002).

¹³³ *Id.*

¹³⁴ *Id.* at 186.

In *Pelegrini v. Principi*,¹³⁵ the CAVC addressed the issue of the timing of proper VCAA notice. First, it held that the VCAA and its implementing regulations applied to all claims pending before VA on the date of its enactment,¹³⁶ a stance already accepted by VA.¹³⁷ Next, the CAVC found the VCAA required proper notice prior to the initial denial of a claim by the agency of original jurisdiction.¹³⁸ In cases such as *Pelegrini*, in which initial adjudication had occurred prior to enactment of the VCAA, the CAVC did not find voiding or nullification of the initial decision by the agency of original jurisdiction was required.¹³⁹ However, in light of the Federal Circuit's holding in *DAV* affirming the need to afford appellants "'one review on appeal to the Secretary'" under 38 U.S.C. § 7104(a), readjudication of an appeal by the agency of original jurisdiction after proper notice was afforded the appellant would be necessary unless waiver of such was obtained.¹⁴⁰ The CAVC in *Pelegrini* also expanded its analysis in *Quartuccio* to include a fourth notice element, finding VA must "'also request that the claimant provide any evidence in the claimant's possession that pertains to the claim.'"¹⁴¹

The Federal Circuit more fully addressed the timing of the VCAA in *Mayfield v. Nicholson*,¹⁴² in which it made clear that proper notice must, if possible, be provided prior to initial consideration of the claim by VA, and the duty to notify was not satisfied by "various post-decisional communications from which a claimant might have been able to infer what evidence the VA found lacking in the claimant's presentation."¹⁴³ Nevertheless, such timing errors could be cured by compliant VCAA notification followed by readjudication

¹³⁵ 18 Vet. App. 112 (2004).

¹³⁶ *Id.* at 118-19.

¹³⁷ DVA Op. Gen. Counsel Prec. 7-2003 (Nov. 19, 2003).

¹³⁸ *Pelegrini v. Principi*, 18 Vet. App. 112, 119-20 (2004).

¹³⁹ *Id.* at 120.

¹⁴⁰ *Id.* at 122-24 (quoting *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1341-42 (Fed. Cir. 2003)).

¹⁴¹ *Id.* at 121 (quoting 38 C.F.R. § 3.159(b)(1)).

¹⁴² *See generally* *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

¹⁴³ *Id.* at 1333.

of the claim.¹⁴⁴ Additionally, such readjudication could be read into VA's issuance of a Supplemental Statement of the Case (SSOC), a document VA was required to issue upon any material changes to the information contained within the Statement of the Case (SOC), such as the receipt of pertinent evidence or a material defect in the SOC.¹⁴⁵

D. VCAA Notice Specific to Certain Claims Types

In addition to addressing notice requirements in all claims, the courts have been called upon to consider whether, and what kind of, specific notice is required for various types of claims.¹⁴⁶ The Federal Circuit had already touched on this question in *PVA*, holding that in general, VA is not required under 38 U.S.C. § 5103(a) “to identify *with specificity* the evidence necessary to substantiate the claim.”¹⁴⁷ The Federal Circuit further expanded on this analysis in *Wilson v. Mansfield*,¹⁴⁸ in which a claimant charged generic notice by VA did not satisfy 38 U.S.C. § 5103(a), which required “specific notice of the missing evidence with respect to a particular claim.”¹⁴⁹ Observing first that the VCAA itself did not set out the level of required specificity, the Federal Circuit concluded, based on review of the legislative history, that Congress did not intend “to require an analysis of the individual claim in each case.”¹⁵⁰ Thus, VA’s notice “may be generic in the sense that it need not identify evidence specific to the individual claimant’s case (though it necessarily must be tailored to the specific *nature* of the veteran’s claim).”¹⁵¹

¹⁴⁴ *Id.* at 1333-34.

¹⁴⁵ *Mayfield v. Nicholson*, 499 F.3d 1317, 1323-24 (Fed. Cir. 2007); 38 C.F.R. § 19.31 (2009).

¹⁴⁶ *See* *Dingess v. Nicholson*, 19 Vet. App. 473 (2006) (considering specific notice required in service connection claims); *Kent v. Nicholson*, 20 Vet. App. 1 (2006) (considering specific notice required in applications to reopen); *Hupp v. Nicholson*, 21 Vet. App. 342 (2007) (considering specific notice required in dependency and indemnity compensation (DIC) claims); *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008) (considering specific notice in increased rating claims), *vacated*, 580 F.3d 1270 (Fed. Cir. 2009).

¹⁴⁷ *Paralyzed Veterans of Am. v. Sec’y of Veterans Affairs*, 345 F.3d 1334, 1347 (Fed. Cir. 2003) (emphasis added).

¹⁴⁸ 506 F.3d 1055 (Fed. Cir. 2007).

¹⁴⁹ *Id.* at 1059.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1062 (emphasis added).

In *Dingess v. Nicholson*,¹⁵² the CAVC addressed the notice requirements for claims of service connection. The CAVC first found that a service connection claim consisted of “five distinct elements: ‘(1) [V]eteran status; (2) existence of a disability; (3) a [nexus] between the veteran’s service and the [claimed] disability; (4) *degree of disability*; and (5) *effective date of the disability*.’”¹⁵³ In *Dingess*, VA did not dispute the need under 38 U.S.C. § 5103(a) to provide notice on elements 1, 2, and 3, as obviously necessary to substantiate a service connection claim.¹⁵⁴ Rather, the Secretary questioned whether 38 U.S.C. § 5103(a) also required notice of elements 4 and 5.¹⁵⁵ In this regard, the CAVC answered in the affirmative, finding that the 38 U.S.C. § 5103(a) requirement extended to all five elements of a service connection claim, as an initial rating and effective date would be assigned at the time service connection was granted, if the evidence warranted such an award.¹⁵⁶ Thus, compliance with 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b) required VA to provide “notice that a disability rating and an effective date for the award of benefits will be assigned if service connection is awarded.”¹⁵⁷ The CAVC went on to explain that the required notice would inform a claimant that an initial rating would be “based on the nature of the symptoms of the condition for which disability compensation is being sought, their severity and duration, and their impact upon employment.”¹⁵⁸ Appropriate notice “must provide examples of the types of medical and lay evidence that the claimant could submit (or ask VA to obtain) that are relevant to establishing” an initial rating.¹⁵⁹ Finally, VA’s notice must indicate that an effective date will be awarded “based on when VA receives the claim, when the evidence establishes the basis for a disability rating that reflects that level of disability was submitted, or on the day

¹⁵² *Dingess v. Nicholson*, 19 Vet. App. 473 (2006).

¹⁵³ *Id.* at 484 (first alteration in original) (quoting *Collaro v. West*, 136 F.3d 1304, 1308 (Fed. Cir. 1998)).

¹⁵⁴ *Id.* at 485.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 485-86.

¹⁵⁷ *Id.* at 486.

¹⁵⁸ *Id.* at 488.

¹⁵⁹ *Id.*

after the veteran's discharge from service" if the claim is received within a year after service separation.¹⁶⁰ As in *Pelegriani*,¹⁶¹ the CAVC in *Dingess* held that notice concerning all five elements of a service connection claim "must precede any initial adjudication on them."¹⁶² Thereafter, upon the award of service connection, with an accompanying initial disability rating and effective date, 38 U.S.C. § 5103(a) no longer applies, at it has served its purpose and the claim has already been substantiated.¹⁶³ Thereafter, 38 U.S.C. §§ 5103A and 7105(d) were created to make certain the claimant was provided assistance throughout the claims process.¹⁶⁴

Next, in *Kent v. Nicholson*,¹⁶⁵ the CAVC considered VCAA notice requirements in the context of an application to reopen a claim pursuant to 38 U.S.C. § 5108. As the CAVC noted in *Quartuccio*,¹⁶⁶ the VCAA applies to such claims.¹⁶⁷ In order for a previously- and finally-denied claim to be reopened, the applicant must submit evidence which is both new and material.¹⁶⁸ In the context of VA benefit claims, these terms have "specific, technical meanings that are not commonly known to VA claimants."¹⁶⁹ The "unique character of evidence" required to reopen a claim thus required VA to "notify a claimant of the evidence and information that is necessary to reopen the claim and . . . the evidence and information that is necessary to establish his entitlement to the underlying claim."¹⁷⁰ As what constitutes new and material evidence in each case is case specific, the CAVC further found that VA had an obligation "to look at the bases for denial in the prior decision and to respond with a notice letter that

¹⁶⁰ *Id.*

¹⁶¹ *Pelegriani v. Principi*, 18 Vet. App. 112, 119-20 (2004).

¹⁶² 19 Vet. App. at 489.

¹⁶³ *Id.* at 490.

¹⁶⁴ *Id.* at 491.

¹⁶⁵ 20 Vet. App. 1 (2006).

¹⁶⁶ *Quartuccio v. Principi*, 16 Vet. App. 183, 186 (2002).

¹⁶⁷ *Kent*, 20 Vet. App. at 8.

¹⁶⁸ 38 U.S.C.A. § 5108 (2006); 38 C.F.R. § 3.156 (2009).

¹⁶⁹ *Kent*, 20 Vet. App. at 9.

¹⁷⁰ *Id.*

describes what evidence would be necessary to substantiate that element or elements required to establish service connection that were found insufficient in the previous denial.”¹⁷¹ The CAVC thus read the VCAA to create a notice obligation on VA which, in claims to reopen, required it to craft notice unique to an individual claim, encompassing specific notice of the missing element or elements.¹⁷² *Kent* was not the first time the CAVC had found specific tailoring of VCAA notice was required; it had previously addressed the question of specificity in *Dingess* when it held:

If the claimant’s application suggests there is specific information or evidence necessary to resolve an issue relating to elements of a claim, VA must consider that when providing notice and tailor the notice to inform the claimant of the evidence and information required to substantiate the elements of the claim reasonably raised by the application’s wording.¹⁷³

In a number of prior cases, the CAVC had found that under 38 U.S.C. § 5103(a), VA had a duty to provide notice of specific evidence or types of evidence sufficient to support a claim; for example, it has found that in the case of a veteran seeking service connection for posttraumatic stress disorder due to alleged in-service stressors, VA erred in failing to specifically “advise the appellant that he could submit corroboration in the form of ‘buddy statements’ as to some of the occurrences that he alleged were in-service stressors.”¹⁷⁴ However, in *Locklear v. Nicholson*,¹⁷⁵ the CAVC held that 38 U.S.C. § 5103(a) does not require VA to “analyze the evidence already in its possession and inform the claimant that the evidence is insufficient to support an award” of

¹⁷¹ *Id.* at 10.

¹⁷² *Id.*

¹⁷³ *Dingess v. Nicholson*, 19 Vet. App. 473, 488-89 (2006) (citing *Suttman v. Brown*, 5 Vet. App. 127, 132 (1993)).

¹⁷⁴ *Sizemore v. Principi*, 18 Vet. App. 264, 274 (2004).

¹⁷⁵ 20 Vet. App. 410 (2006).

the benefit sought.¹⁷⁶ The primary function of the duty to notify was to aid in evidence gathering, not in evidence analysis.¹⁷⁷ Nevertheless, full 38 U.S.C. § 5103(a) compliance provides “some cognitive review of the claim must be made prior to providing the notice and that a generalized or boilerplate notice letter might not suffice in some cases.”¹⁷⁸

In *Hupp v. Nicholson*,¹⁷⁹ the CAVC addressed VA’s 38 U.S.C. § 5103(a) notice obligation in the context of a claim for DIC benefits under § 1310. In that case, the appellant argued that under the VCAA, VA was “required to inform a claimant of how the evidence in the file at the time a claim for benefits is made is insufficient.”¹⁸⁰ However, the CAVC declined to read such a requirement into 38 U.S.C. § 5103(a), citing its prior holding in *Locklear* that VA need not address the “probative value of information and evidence presented in connection with a claim prior to rendering a decision on the merits of the claim itself.”¹⁸¹ Nevertheless, the notice provided by VA must take into account the application submitted, and the type of benefit sought.¹⁸² Here, the CAVC found a situation analogous to that in *Kent*, which concerned an application to reopen a claim, and concluded that a more specific form of notice was likewise required. Under 38 U.S.C. § 1310, DIC benefits could be awarded if a service-connected disability was either the principal or a contributory cause of death, or if the cause of the veteran’s death was itself found to be service-connected.¹⁸³ Accordingly, the CAVC held that compliant 38 U.S.C. § 5103(a) notice, in the case of a DIC claim, must include:

¹⁷⁶ *Id.* at 415.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 416 (citing *Kent v. Nicholson*, 20 Vet. App. 1, 10 (2006)).

¹⁷⁹ 21 Vet. App. 342 (2007).

¹⁸⁰ *Id.* at 350.

¹⁸¹ *Id.* at 351 (citing *Locklear v. Nicholson*, 20 Vet. App. 410, 415-16 (2006)).

¹⁸² *Id.* at 352.

¹⁸³ 38 U.S.C. § 1310 (2006); 38 C.F.R. § 3.312 (2009).

(1) a statement of the conditions, if any, for which a veteran was service connected at the time of his . . . death; (2) an explanation of the evidence and information required to substantiate a DIC claim based on a previously service-connected condition; and (3) an explanation of the evidence and information required to substantiate a DIC claim based on a condition not yet service connected.¹⁸⁴

Accordingly, specific notice requirements were established by the CAVC in DIC claims.

The CAVC next addressed, in *Vazquez-Flores v. Peake (Vazquez I)*,¹⁸⁵ the question of 38 U.S.C. § 5103(a) notice in claims for increased ratings. Observing first that increased rating claims differed from service connection claims in that the only point of focus was evaluation of a disability for which service connection had already been granted, compliant notice thus required informing the claimant that he must provide, or ask VA to obtain, medical or lay evidence “demonstrating a worsening or increase in severity of the disability and the effect that worsening has on the claimant’s employment and daily life.”¹⁸⁶ Additionally, the CAVC also found that if, within the diagnostic code under which the claimant was currently rated, a higher rating could not be demonstrated by evidence showing a worsening or increase in severity of the disability and the effect of that worsening on the claimant’s daily life and employment, notice of this fact must be provided to the claimant.¹⁸⁷ Within a subsequent order denying VA’s motion to stay the precedential effect of the *Vazquez I* decision, the CAVC found that decision to require a “common-sense assessment” of both the diagnostic

¹⁸⁴ *Hupp*, 21 Vet. App. at 352-53.

¹⁸⁵ 22 Vet. App. 37 (2008), *vacated sub nom. Vazquez-Flores v. Shinseki (Vazquez II)*, 580 F.3d 1270 (Fed. Cir. 2009).

¹⁸⁶ *Id.* at 43.

¹⁸⁷ *Id.*

criteria under which the claimant was already rated, as well as any cross-referenced criteria to determine if they would be satisfied by a demonstration of noticeable worsening or an increase in the severity of the disability.¹⁸⁸ VA took issue with the *Vazquez I* decision and appealed to the Federal Circuit.

In addressing VA's appeal of the CAVC's *Vazquez I* decision, the Federal Circuit looked back to its holdings in *PVA* and *Wilson*, both of which considered the level of notice required under 38 U.S.C. § 5103, and both of which concluded 38 U.S.C. § 5103(a) could be satisfied by notice which was generic in nature.¹⁸⁹ It read compliant notice to be specific to the *type* of claim, but not specific to the *claimant*, or his case, itself.¹⁹⁰ Turning then to the CAVC's *Vazquez I* holding, the Federal Circuit found it in error, as it would essentially require VA to issue notice which was "veteran-specific," requiring different notices to claimants seeking the same type of benefit, an increased rating.¹⁹¹ *Vazquez I* was thus vacated by the Federal Circuit.¹⁹²

During this time, Congress acted to more explicitly clarify the notice requirements of 38 U.S.C. § 5103(a), amending it effective October 10, 2008 to require the Secretary to promulgate regulations which differentiated notice to claimants depending on the type of claim, benefit, or service sought.¹⁹³

CONCLUSION

To evaluate the effectiveness of the CAVC's, and to some extent VA's, focus on the notice aspect of the VCAA, the analysis must begin with the Veterans' Judicial Review Act of 1988. This

¹⁸⁸ *Vazquez-Flores v. Peake*, 22 Vet. App. 91, 93 (2008).

¹⁸⁹ *Vazquez II*, 580 F.3d at 1276-78.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1280-81.

¹⁹² *Id.* at 1281.

¹⁹³ Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 101, 122 Stat. 4145, 4147-48.

legislation sought to provide veterans with an additional level of review, apart from the executive branch, while codifying VA regulations, already in place, related to the efforts VA should undertake to assist claimants to substantiate a benefits claim.¹⁹⁴ Effectively, Congress sought to simplify the VA benefits process and allow claimants further independent review of benefits claims. The *Morton* decision not only ignored the VA benefits structure Congress sought to create, but also ignored VA's long-standing policies related to the adjudication and development of benefits claims, which predated the CAVC. Presented with a series of cases that substantially altered the VA benefits process, Congress was forced to act.

Congress's response to the *Morton* case was the passage of the Veterans' Claims Assistance Act of 2000, which codified both the notice and development requirements for VA benefits adjudication. In passing the VCAA, Congress made plain that (i) there are specific duties VA must attempt to ensure a claim is fully developed; (ii) a claimant should be notified of what evidence is relevant to the submitted claim; and (iii) it is important to clearly inform a claimant what VA can, and will, do to assist the claimant in establishing entitlement to the benefits sought. As with its ruling in *Morton*, the CAVC decisions, and some of VA's implementing regulations, that focus on notice miss what Congress intended when the VCAA was enacted.¹⁹⁵

As with the passage of the Veterans' Judicial Review Act of 1988, Congress recognized that claims for VA benefits were best served through VA undertaking efforts to obtain evidence relevant to the claim. Passage of the VCAA simply was an attempt to further protect claimants, by informing them of VA's duties and

¹⁹⁴ See H.R. REP. NO. 100-963, at 5800-02 (1988); see also Pub. L. No. 100-687, 4105 Stat. 11 (1988).

¹⁹⁵ See, e.g., *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008), *vacated*, *Vazquez II*, 580 F.3d at 1281; *Hupp v. Nicholson*, 21 Vet. App. 342 (2007); *Kent v. Nicholson*, 20 Vet. App. 1, 10 (2006); *Dingess v. Nicholson*, 19 Vet. App. 473 (2006); *Pelegriani v. Principi*, 18 Vet. App. 112 (2004); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002).

their own need to inform VA of relevant evidence that VA should attempt to obtain on their behalf. Stated differently, Congress, recognizing that notice letters did not substantiate claims, wanted to make sure claimants received clear notice of VA's obligations to assist with the development of their claim and to have VA undertake appropriate efforts to obtain evidence to assist the claimant—whether it be obtaining Social Security records, service treatment records, service personnel records, VA or private treatment records, or obtaining a medical opinion or examination at the expense of the government.

One need only look to the passage of the Veterans' Benefit Improvement Act of 2008,¹⁹⁶ which was originally introduced by Senator Daniel Akaka and Senator Olympia Snow, and the Veterans' Notice Clarification Act of 2008,¹⁹⁷ to understand that the CAVC's focus on notice is mislaid. In the Committee Report associated with the Veterans' Notice Clarification Act of 2008, Congress specifically noted an intention to "require VA to promulgate regulations specifying the content of VCAA notices provided to claimants . . . requir[ing] the notice specify for each type of claim for benefits the general information and evidence required to substantiate the claim."¹⁹⁸ Moreover, Congress took direct aim at both the CAVC and VA, citing the CAVC's decisions in *Dingess* and *Vazquez I* and VA's interpretation of *Vazquez I*, noting these as instances where the intent of Congress was thwarted and resulted in negative consequences for the claimant. As Congress was well aware of the need for claimants to understand the necessary elements of their claim, and of the actions of the CAVC and VA related to VCAA notice, Congress went to multiple ROs and examined the notice letters provided to various claimants. After this review, Congress noted:

¹⁹⁶ See Veterans' Benefits Improvement Act, § 101, 112 Stat. at 4147-48.

¹⁹⁷ See S. REP. NO. 110-449 (2008).

¹⁹⁸ *Id.* at 1731.

Since the enactment of the VCAA, various actions, including decisions of the [CAVC] and VA's responses to some of those decisions, have led to notices that are not meeting the goal of providing claimants with sufficient, clear information on which they can then act. Instead of simple, straightforward notices that can be easily read and understood by claimants, VA is now routinely providing long, frequently convoluted, overly legalistic notices that do not meet the objective of the VCAA.¹⁹⁹

This statement crystallizes the view of the authors that Veterans are best served when VA focuses on obtaining evidence and medical opinions relevant to a particular claim for VA benefits. This effort is supplemented by notifying the claimant of what actions VA will undertake and what a claimant can do to facilitate VA's efforts, as well as independent of VA, but at the end of the day, evidence, not notice, results in the grant of a VA benefits claim. To be sure, adequate notice can and does lead to the discovery or development of additional pertinent evidence, but only in so far as the claimant is made aware, *in a clear and concise manner*, of the type of evidence required to complete the claim. As the legislative history makes clear, notice itself was not the primary motive behind the passage of the VCAA.

To illustrate the limited and supplemental role of notice, Congress cited claims for increased disability ratings. For a claim of this nature, Congress determined sufficient notice only required the Veteran be informed (i) that an appropriate examination would be scheduled; and (ii) of "the general information and medical or lay evidence needed to establish a claim for extra-schedular consideration."²⁰⁰ Congress favored limited and succinct notice of this nature because "the best evidence upon which to evaluate a

¹⁹⁹ *Id.* at 1729.

²⁰⁰ *Id.* at 1733.

claim for an increased rating is a complete and thorough medical examination that should provide sufficient evidence for VA rating staff to determine which rating code is appropriate to the findings and diagnosis made by the examiner."²⁰¹ Taken together, one is made aware that Congress favored regulations that ensured VA undertook appropriate efforts to assist a claimant in substantiating the submitted claim, while viewing notice as a less important aspect of the VA claims and development process.

In sum, the VA benefits adjudication process was and continues to be non-adversarial in nature, and VA has a long history of assisting claimants in developing a claim for VA benefits. In that context, the recent actions by the CAVC, and to a lesser extent VA, that seek to inform a claimant of every conceivable regulation that may, or may not, apply to the specific claim, not only unnecessarily consume VA resources and confuse claimants, but also often prove to serve no real benefit to the claimant.²⁰² As was the case prior to the creation of the CAVC, VA best serves claimants by assisting with the development of claims, and notice, while important, should not be considered by the CAVC, or VA, as the primary tool or focal point that best aids claimants seeking VA benefits.²⁰³ Essentially, the CAVC and VA should focus on (i) obtaining records, such as service treatment records, service personnel records, Social Security Administration records, and VA and private treatment records; (ii) providing

²⁰¹ *Id.*

²⁰² See 07-26 184, 2009 WL 5512179 (BVA Nov. 27, 2009) (remanding a claim to reopen a previously-denied claim for nonservice-connected pension to provide the Veteran notification that his claim was previously denied because he did not have 90-days of active duty service during war, as required to qualify for the benefit).

²⁰³ It appears that the passage of the Veterans' Benefits Improvement Act of 2008 was an effort to limit CAVC's ability to impact VA's decisions related to notice. In fact, Congress specifically explained these efforts:

VA does not require statutory authority to make the proposed changes to its notices and welcomes the expected introduction of these revised notices in November 2008. However, the Committee believes that, given the history of judicial interpretations of the notice requirement, a statutory basis for the revised VCAA notice regulations should be enacted.

S. REP. NO. 110-449, at 1734.

medical examinations and opinions; and (iii) eliciting relevant information from the Veteran. Stated differently, VA should focus resources in a way that actually aids claimants in substantiating their VA benefits claims, which may be done with clearly worded, concise notice letters that are relevant to the submitted claim.