No. 17-1551
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ANDRE MARTINEZ,
Appellant,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS' APPEALS

(BVA Veterans Law Judge: Michael A. Martin)

BRIEF OF APPELLANT, ANDRE MARTINEZ

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I. ISSUE PRESENTED FOR REVIEW

ISSUE #1

38 U.S.C. §5103A(a)(1) requires the Secretary "assist a claimant in obtaining evidence to substantiate the claim".

The Secretary denied Mr. Martinez's claim for service connection of sleep apnea by relying on a VA medical opinion finding PTSD did not cause sleep apnea. The Secretary did not give Mr. Martinez a copy of the opinion before relying on it to deny the claim.

Did the Secretary violate the duty to assist when it did not give Mr. Martinez a copy of a medical opinion before relying on it to adjudicate a benefits claim?

ISSUE #2

Determining how much process is due a veteran under the 5th Amendment requires consideration of the degree of potential deprivation, the fairness and reliability of existing procedures, and the public interest.

Mr. Martinez was potentially deprived of over $100,000 in past-due compensation when the Secretary failed to give him a copy of a medical opinion he relied on in denying benefits. Before that denial, 6 written requests for the C-file, a petition for writ of mandamus to this Court, and two standing disclosure authorizations on the Secretary's own form failed to produce the opinion on which the Secretary relied in the denial. The Secretary's current process promotes an inefficient judiciary and affords veterans who stood against our nation's enemies less process than that due those accused of being her enemies.

Does the Due Process clause of the 5th Amendment require the Secretary to give Mr. Martinez a copy of the material intended to be relied on to adjudicate a veteran's claim for benefits?

II. STATEMENT OF THE CASE.

A. Jurisdictional Statement.

The Court's jurisdiction flows from 38 U.S.C. §7252(a), which grants it exclusive jurisdiction to review Board decisions.

B. Statement of the Case and Relevant Facts.

Mr. Martinez served on active duty in the US Army from January 20, 1969, through December 8, 1970; he had an additional sporadic 7.8 years of active federal service in the Army National Guard between 1970 and 1995. R. at 640, 778, 780, 2024.

Mr. Martinez claimed service connection of his sleep apnea on April 14, 2005. R. at 3380. The Secretary denied the claim in November 2006. R. at 2815 – 2817, 2828 – 2829, 2830 – 2836. Mr. Martinez noticed his disagreement in July 2007. R. at 2689 – 2690. The Secretary issued a SOC in 2008 and a Supplemental SOC in August 6, 2009. R. at 2332 – 2352, 2148 – 2157. Mr. Martinez timely perfected his appeal. R. at 2281.

The BVA remanded the appeal in February 2010 for development of service records and readjudication of the sleep apnea claim, among others. R. at 2080 – 2097. The Secretary provided neither exam nor opinion for the sleep apnea claim yet continued his denial through a November 2011 SSOC. R. at 1716 - 1734. The BVA again remanded the appeal in April 2012, this time to procure private medical records related to Mr. Martinez's sleep apnea. R. at 1686 – 1700; *accord,* R. at 1692, 1735, 1759, 1929. The Secretary continued his denial through an October 2013 SSOC. R. at 1390 – 1398.

In January 2014, the BVA's 3rd remand of the sleep apnea claim ordered the Secretary to perform a nexus exam and issue a medical opinion. R. at 1324 – 1343, 1342. In February 2014, the VA requested an exam for the sleep apnea claim. R. at 1287 - 1290. In March 2014, a VA nurse practitioner opined Mr. Martinez's PTSD did not cause his sleep apnea, but it "does aggravate or increase severity of the apnea." R. at 1255, 1254 – 1257. The Secretary believed, without explanation, that these 2 statements contradicted each other, and developed another exam and opinion in January 2016; a clinical neuropsychologist agreed Mr. Martinez's PTSD did not cause his sleep apnea but remained silent on whether it aggravated his sleep apnea. R. at 499 – 506. The neuropsychologist did add "increasing fat" worsened Mr. Martinez's sleep apnea. *Id.*

The Secretary continued his sleep apnea denial through a May 2016 SSOC. R. at 235 – 254. Mr. Martinez submitted his written argument in support of his claim for service connection on November 3, 2016. R. at 35 - 41.

The BVA issued its decision denying service connection for sleep apnea in January 2017. R. at 2 – 32. The BVA found, without explanation, "…the [sleep apnea] examinations to be adequate for decision-making purposes", and "consistent with and responsive to the January 2014 Board remand directives". R. at 7, 9. The BVA relied on the January 2016 opinion as the only "competent evidence of record pertinent to th[e] question" of whether Mr. Martinez's sleep apnea is secondarily related to his service-connected PTSD. R. at 11.

The Board relied on the March 2014 and January 2016 opinions "in the aggregate, as probative evidence that it is not at least as likely as not that the Veteran's sleep apnea is

proximately due to, caused by, or aggravated by his service-connected PTSD." R. at 13. The Board considered and rejected multiple medical abstracts pertaining to any relationship between PTSD and sleep apnea. R. at 14-16.

Prior to the BVA deciaion, Mr. Martinez's representatives spent approximately 2 years trying to get a copy of his claims file (C-File) before a final denial of his benefits. First, in April 2013, his VSO representative sought a copy of the C-File. R. at 1603. There is no evidence of a response or proof that the file was ever delivered.

In December 2013, before the VA developed any sleep apnea medical opinion Mr. Martinez hired an attorney. R. at 1352, 1354 – 1358, 1359 – 1360. He also submitted a standing disclosure authorization on the Secretary's own form, allowing "ongoing" disclosure to his attorney of information pertaining to his VA record. R. at 1352. On December 6, 2013, his attorneys submitted a Freedom of Information Act "FOIA" request for Mr. Martinez's C-File, along with a waiver of the Privacy Act protections in his VA Form 21-22a.[1] R. at 921 - 926.

On April 10, 2014, Mr. Martinez's attorney made a second request for the C-File under the FOIA. R. at 927 - 934. The Secretary's April 21, 2014, response acknowledged the request and re-characterized it as a "request for the veteran's records under the Privacy Act

[1] In the fine print of the "Conditions of Appointment section of the VA's Form 21-22a is the following language: "I authorize VA to release any and all of my records (other than as provided in items 9 and 10) to that individual appointed as my representative…". R. at 924.

of 1974". R. at 997.[2] The Secretary indicated the file was at the Appeals Management Center, where the request was allegedly forwarded. *Id.*

On August 14, 2014, Mr. Martinez's attorney made a third FOIA request for the C-File. R. at 935 - 936. The Secretary responded the request had been received and approved, no records were included, but he would handle the production "on a priority basis". R. at 871.

On October 15, 2014, Mr. Martinez's attorney made a fourth C-File request under the FOIA. R. at 876. His attorney forwarded the request to the Regional Office director on October 20, 2014. R. at 937 - 938. The Secretary did not respond.

On November 24, 2014, Mr. Martinez's attorney made a fifth request for the C-File under the FOIA. R. at 939 - 942. The Secretary did not respond.

On February 23, 2015, Mr. Martinez filed a petition for writ of mandamus with this Court, seeking production of his C-File. R. at 889 - 907. The Secretary's attorney had difficulty getting his client to provide reasons for the delay in producing a C-File. R. at 887-888. The Secretary acknowledged the request for Mr. Martinez's claims file on March 13,

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[2] This re-characterization of a FOIA request to a so-called "Privacy Act request", which may be unlawful, seems to enable the Secretary to dodge strict FOIA response times: non-exempt records responsive to a FOIA request must be produced within twenty (20) calendar days. 5 U.S.C. § 552(a)(6)(i). However, to enforce that statute, a veteran must expend months and thousands of dollars in attorney fees filing a FOIA lawsuit Federal District Court. 5 U.S.C. §552(a)(4)(B). Congress imposed no statutory time limit to respond to a so-called "Privacy Act Request". 38 U.S.C. § 552a(d)(1). While the interplay between the Privacy Act and FOIA is outside this court's jurisdiction, Mr. Martinez notes it to show the bureaucratic gauntlet he must navigate to simply see the government's evidence against his benefits claim.

2015. R. at 824, 825. He re-characterized the FOIA request as a Privacy Act request, and allegedly forwarded it to the New York Regional Office. R. at 824.

The Secretary's first action to prepare the file for disclosure to Mr. Martinez is March 17, 2015 – nearly 2 years after his first request in April 2014. R. at 883. The RBA includes no proof the Secretary ever produced a C-File to Mr. Martinez and his attorney; the VA Office of General Counsel FOIA Appeals office did allege they sent something to the attorney on March 19, 2015, but nobody knows what that was.[3]

On/about September 7, 2015, Mr. Martinez submitted another standing disclosure authorization. R. at 782.

Neither the BVA nor the Secretary gave the veteran or his attorney an opportunity to see the January 2016 opinion before the BVA denied Mr. Martinez's claim for service connection. The first time Mr. Martinez and his attorney saw the adverse January 2016 opinion was in reviewing the RBA served in this appeal.

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[3] The March 19, 2015, letter is attached as *Appendix A*, hereto, pursuant to CAVC Rules of Practice and Procedure 28(i), 30(a). There is no evidence in the RBA or in the cover letter what was and what was not included in this alleged production. Mr. Martinez's attorneys did not refer to the favorable March 2014 medical opinion in their argument for service connection in November 2016, lending support to the likelihood the exam opinion and other evidence was not included. Regardless, it is believed to be undisputed that the adverse January 2016 opinion, on which the BVA clearly relied in denying service connection of sleep apnea, was not delivered to Mr. Martinez or his attorney until production of the RBA in this appeal.

III. SUMMARY OF THE ARGUMENT.

This case is not about the need for a medical opinion to make a decision on Mr. Martinez's sleep apnea service connection claim. The parties do not dispute that a nexus opinion was necessary to decide the claim, nor do they dispute one was developed by the Secretary. The dispute in this appeal is whether the Secretary is required to give Mr. Martinez a copy of the medical opinion he developed before deciding the claim.

Mr. Martinez argues Congress was clear: the Secretary's duty to assist is fulfilled only when the veteran obtains – takes hold of – a medical opinion developed by the Secretary. The Secretary is expected to argue he has no affirmative duty to give Mr. Martinez evidence he develops in his claim before he decides the claim.

First, Mr. Martinez argues Congress's simple and clear language resolves the dispute between the parties: Congress required the Secretary assist him in obtaining, or taking hold of, a medical opinion developed by the Secretary. He shows how the Secretary's regulation "parroting" Congress reinforces his argument. Should the Secretary introduce a new interpretation of the statute or regulation in response, the *Gardner* presumption is the controlling interpretive rule; *Auer* deference should not extend to any interpretation the Secretary offers.

Second, Mr. Martinez argues that where he suffers enormous potential personal and financial deprivations, where six requests a petition for writ of mandamus to this Court, and 2 "ongoing disclosure" authorizations on the Secretary's own form were not enough to ensure the Secretary gave him a copy of the medical opinions necessary to decide his case,

and where the public has a strong interest in both an efficient judiciary and a benefits process that extends no less process to the veterans who stood against our nation's enemies than is extended to those accused of being her enemies, the 5th Amendment's due process clause requires the Secretary to disclose to the veteran all of the material relied upon before deciding a claim.

This right is so basic its violation can never be harmless.

IV. STANDARD OF REVIEW.

This Court interprets statutes and resolves constitutional matters *de novo,* without deference to the BVA. 38 U.S.C. § 7261; *see, Lane v. Principi,* 339 F.3d 1331 (Fed. Cir. 2003); *Reeves v. West,* 11 Vet. App. 255 (1998). Because the right of access to government evidence supporting deprivation of a protected property is so basic, its violation can never be treated as harmless error. *Chapman v. California,* 386 U.S. 18, 23-24 (1967).

V. ARGUMENT.

1 A plain reading of Congress's command that the VA "assist a claimant in obtaining evidence" means the Secretary must give the evidence to the claimant.

1.1 38 U.S.C. §5103A(a)(1) requires the Secretary "assist a claimant in obtaining evidence to substantiate the claim".

Congress plainly stated the Secretary's duty to assist claimants:

> "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." 38 U.S.C. § 5103A(a)(1).

The duty has four major aspects. The first focuses on the degree of effort the Secretary must expend to fulfill the duty: "[t]he Secretary shall make reasonable efforts". The second focuses on the goal of the duty: "to assist a claimant in obtaining evidence". The third aspect limits that goal to evidence "necessary to substantiate the claimant's claim". The fourth aspect limits the scope of the duty to "a benefit under a law administered by the Secretary." 38 U.S.C. §5103A(a)(1).

This appeal involves the second aspect, the goal of the duty to assist. Specifically, Mr. Martinez argues Congress meant what it said when it required the Secretary to fulfill a legal duty "to assist a claimant in obtaining evidence". *Id.*

This is a matter of first impression: Mr. Martinez asks the Court to decide that the phrase "assist a claimant in obtaining evidence" means the Secretary must give a copy of a VA medical opinion necessary to decide the claim. Mr. Martinez intends to seek panel review[4] and a precedential decision. *Frankel v. Derwinski,* 1 Vet App. 23 (1990).

He argues the meaning of the word "obtain" is plain, and in the context of the rest of its sentence, the statute, and the textually defined purpose of the statute, the Secretary can

[4] CAVC Rule 35(b) allows a request for panel decision after a single judge affirmance of the BVA decision. Neither that rule nor any statute, court rule, policy or procedure prevents a screening judge from deciding a particular matter instead warrants a panel. *Accord*, Internal Operating Procedures Section I(b), at page 1.

only fulfill his duty "to assist a claimant in obtaining evidence" when he gives that evidence to the claimant.

1.2 Congress used plain English: unless the claimant has received the evidence, the Secretary has failed to "assist a claimant in obtaining evidence".

Statutory interpretation begins and ends with the pain language of a statute, derived from the text and its structure. *Myore v. Nicholson,* 489 F. 3d 1207 (Fed. Cir. 2007). This first step requires deciding "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co., Inc.* 534 U.S. 438, 450 (2002)(internal quotation marks omitted). Unless defined in another way, "…words will be interpreted as taking their ordinary, contemporary common meaning." *Perrin v. U.S.,* 444 U.S. 37, 42 (1979).

Congress's stated the Secretary's duty is to assist claimants *in obtaining evidence*:

> "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." 38 U.S.C. § 5103A(a)(1).

The phrase "in obtaining" is not separately defined in the statute, but it does have a plain and common meaning. 38 U.S.C. §5103A(a)(1). Every major dictionary defines the word "obtain" as getting or acquiring something. Merriam Webster and the Cambridge dictionaries define the transitive verb as meaning to "gain or attain usually by planned

action or effort".[5] The Oxford dictionary has a specific definition when the verb is used, as it is in 38 U.S.C. §5103A(a)(1), with an object: to "Get, acquire or secure (something)".[6] Even the Latin root of the word obtain is clear and unambiguous, as its root verb is "obtinere", meaning to "take hold of". *See e.g.,* "obtinere", *found at http://latin-dictionary.net/search/latin/obtinere* (last visited March 1, 2018). Looking only at the plain English usage of the phrase "assist a claimant in obtaining evidence", Congress's intent was clear: to fulfill the Secretary's "duty to assist [a veteran] in obtaining evidence", he must "assist [a veteran] in [getting] evidence": a veteran cannot obtain that which he does not get.

Congress's grammatical phrasing reinforces the plain meaning of its chosen words. Congress could have written the phrase differently, giving the Secretary a duty to "assist a claimant *by* obtaining evidence". Congress might have required the Secretary "assist a claimant *and* obtain evidence for the claimant." Each of these phrasings would have suggested the Secretary's duty to assist was fulfilled merely by procuring for himself evidence in support of a claim or by putting evidence in a claims file. Instead, Congress used specific phrasing, focusing the Secretary's action – his requirement to assist in obtaining – on the object of that assistance: *the claimant*. Congress's word choice was clear: it wanted the Secretary to help veterans "get" or "take hold of" evidence supporting their claims.[7]

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[5] "Obtain." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 20 Feb. 2018; "obtain." https://dictionary.cambridge.org., last visited 1 Mar. 2018.
[6] "Obtain." https://en.oxforddictionaries.com, last visited 1 Mar. 2018.
[7] Because "the statutory language is unambiguous [the court] need not consult the legislative history." *Mulder v. McDonald,* 805 F.2 1342 (Fd. Cir. 2015). That said, the VCAA's legislative history does not explain Congress's choice of words or phrasing. *See e.g.,*

This theme of helping a veteran – a theme of mutual help – is woven throughout §5103A. *See,* 38 U.S.C. §5103A(c)(1)(B)(the VA's duty to procure certain medical records requires the claimant to help by providing sufficient information); §5103A(b)(4)(claimants urged to submit relevant records unless it burdens a claimant); §5103A(B)(2)(A)(specific notice to veteran when duty cannot be fulfilled); *Wood v. Derwinski,* 1 Vet. App. 190, 193 (1992)("[t]he duty to assist is not always a one-way street.")

The theme of "help" rendered by the Secretary to a claimant is also clear from the simple phrasing of the statutory section title: the duty to *assist*. 38 U.S.C. §5103A. Congress did not title the section "Duty to Prove". Nor did it title it the "Duty to Procure", or the "Duty to Develop the Record", or the "Duty to Get Evidence on Behalf of the Claimant", or the "Duty to Put Evidence in the Claims File", or the "Duty to Get Evidence to the BVA". Congress's section title makes clear the Secretary's duty is to assist the claimant towards the goal of obtaining – taking hold of – evidence.

Applied to Mr. Martinez's claim, the Secretary developed medical opinions in January 2016 and March 2014 to determine whether Mr. Martinez's sleep apnea was secondary to his service-connected PTSD. The Secretary had a duty to assist Mr. Martinez in obtaining that evidence. Mr. Martinez never obtained the opinions because he never physically "took hold of" the opinions. He never physically took hold of them because the

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H.R. Rep. 106-781 (July 24, 2000), *attached as Appendix B*, hereto, pursuant to CAVC Rules of Practice and Procedure 28(i), 30(a).

Secretary never gave them to him. The Secretary failed his duty to assist Mr. Martinez by blocking him from seeing copies of the opinions necessary to decide his claim.

Here, the fulfillment of the Secretary's legal duty to assist Mr. Martinez is as simple as it is plain: give him a copy of the evidence necessary to decide his claim.

1.3 Even if "obtain" is ambiguous, rules of interpretation guide the Court.

As argued above, the words of §5103A(a)(1) are plain and clear; a statute is only ambiguous if the text does not "directly address[] the precise question at issue". *National Assn of Home Builders v. Defenders of Wildlife,* 551 US 644 (2007), *quoting Chevron U.S.A., Inc., v. NRDC,* 467 U.S. 837 (1984). Because the precise question in this case – does the Secretary's duty to "assist a claimant in obtaining evidence" requires him to give Mr. Martinez a copy of the evidence the Secretary develops – is directly addressed by the plain words of the statute, there is no ambiguity.

Should the Secretary assert an ambiguity in the statutory language at issue, Mr. Martinez intends to argue in his reply brief for application of any rule of construction or interpretation which might aid the Court in resolving that alleged ambiguity. Mr. Martinez cannot present these arguments in his original brief, as he is unaware of any alternate or ambiguous interpretation of the statutory language the Secretary might intends to assert.[8]

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[8] The Secretary framed his defense by relying on the CAVC precedential opinion in *Pricket* to relieve him of any affirmative duty to produce a copy of a medical exam opinion as part of the Secretary's duty to assist. *But see, Pricket v. Nicholson,* 20 Vet. App. 370 (2006). In *Pricket,* the Court interpreted 38 U.S.C. §7109, which predates §5103A, and held the BVA

Any ambiguity the Secretary asserts is inherently suspicious. After passage of §5103A(a)(1), the Secretary issued a regulation which, in relevant part, parrots the statute and reinforces Mr. Martinez's assertion that the language at issue is plain and clear:

> "**(c) VA's duty to assist claimants in obtaining evidence.**
> Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts *to help a claimant obtain evidence* necessary to substantiate the claim." 38 C.F.R. §3.159(c)(August 29, 2001)(emphasis in italics added).

In interpreting any alleged ambiguity in §5103A(a)(1), the Secretary's own regulation, or any interpretation of it offered by the Secretary in his response, is not entitled to deference: "[T]he existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Gonzales v. Oregon,* 546 U.S. 243, 257 (2006); *accord, Christensen v. Harris County,* 529 U.S. 576 587 – 588 (2000); *Lopez v. Terrell,* 654 F.3d 176 (2nd Cir. 2011)("where the regulation…does not speak to the statutory ambiguity at issue, *Chevron* deference is inappropriate").

The Secretary's decision to parrot §5103A(a)(1) bolsters Mr. Martinez's argument that the meaning of "assist a claimant in obtaining evidence" is clear. If the Secretary suspected uncertainty in Congress's words, he could have issued a regulation to restore certainty. He did not.

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has no *Thurber-Austin* duty to provide a copy of a medical opinion procured by the BVA. *Thurber v. Brown,* 5 Vet. App. 119 (1993); *Austin v. Brown,* 6 Vet. App. 547 (1994); *contradistinguish,* 38 U.S.C. §5103A, Pub. L. 106-475, §3(a), 114 Stat. 2097 (November 9, 2000). Mr. Martinez argues *Pricket* does not apply to his appeal; to the extent the Secretary argues for *Pricket's* application, Mr. Martinez asks the Court to over-rule it.

1.3.1 The *Gardner* presumption controls the resolution of any interpretive doubt.

Should the Court find the Secretary's own regulation is not clear, the Court would need to resolve the ambiguity using statutory construction canons.

While noting *Gardner* is not a true textual interpretation canon as it speaks more to the spirit of the law than its letter, it is the controlling rule in this case; where there is "interpretive doubt", 38 U.S.C. §5103A(a)(1) should be liberally construed to protect or benefit the veteran. *Brown v. Gardner,* 513 U.S. 115 (1994), *citing King v. St. Vincent's Hospital,* 502 U.S. 214 (1991); *but see, Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946)("…legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Boone v. Lightner,* 319 U.S. 561 (1943)("Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation").

The Secretary has offered no formal interpretation of the language at issue in the statute in this case. Should the Secretary assert some interpretation of the language at issue in the course of the appeal, Mr. Martinez respectfully reserves the right to challenge the interpretation on any grounds available.[9]

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[9] Mr. Martinez footnotes examples of challenges to interpretations the Secretary may first advance in a response brief. He does this not to downgrade their importance, but to avoid cluttering the body of his brief with string citations and parentheticals. *See e.g., Stinson v. United States,* 508 U.S. 36, 45 (1993)(agency interpretation not given controlling weight if it

Mr. Martinez believes 38 U.S.C. §5103A(a)(1) was written to protect and benefit his interests and the collective interests of all veterans. The statute was written to ensure the Secretary helped him to "take hold of" evidence needed to support his claim. In this case, that means holding, in his hands, the medical opinions the Secretary developed in March 2014 and January 2016.

Without "taking hold of" the actual medical opinions on which the Secretary relies, Mr. Martinez has no ability to even research – no less refute or rebut – the medical examiner's qualifications or competence. *But see, Rizzo v. Shinseki,* 580 F.3d 1288, 1291 (Fed. Cir. 2009)(VA doctors are presumed competent).[10] He cannot understand or challenge

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violates the Constitution); *Auer v. Robbins,* 519 U.S. 452 (1997)(Court's deference extends only to agency interpretation that is neither "plainly erroneous" nor "inconsistent with the regulation"); *Christensen v. Harris County,* 529 U.S. 576, 588 (2000)(*Auer* deference not warranted unless language of regulation is ambiguous); *Cobell v. Norton,* 240 F.3d 1081 (D.C. Cir. 2001)(*Chevron* deference does not trump canon of construction which favors the very population protected by the statute); *Christopher v. Smithkline Beecham,* 567 U.S. 142, 155 (2012)(*Auer* deference inappropriate when interpretation is "convenient litigating position" or "post-hoc rationalizatio[n]"); *Decker v. Northwest Envtl. Def. Ctr*, 568 U.S. 597, 621 (2013)(J. Scalia concurring in part and dissenting in part)("*Auer* deference … contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."); *Kisor v. Shulkin,* ___ F.3d ____, 2018 U.S. App LEXIS 2411 at *3-4 (Fed. Cir. January 31, 2018)("When [the *Auer* and *Gardner*] doctrines pull in different directions, it is *Auer* deference that must give way.")(J. O'Malley, J. Newman, and J. Moore dissenting); *Turner v. Shulkin,* ____ Vet. App. _____, 2018 U.S. App. Vet. Claims LEXIS 143 (February 8, 2018)(Court owes no *Auer* deference to interpretation that is neither considered nor well-reasoned).

[10] Mr. Martinez includes the words of Justice Sotomayor and Justice Gorsuch to illustrate one practical consequence of the absurdity of a practice where the duty to "assist a [veteran] in obtaining evidence" does not include giving him a copy of the opinion used to adjudicate his claim:

the examiner's methodology. He cannot examine or review the materials the opinion's author used to research the question. He cannot identify additional evidence which, if it had been available to the opinion's author, might have affected the outcome of the decision.

Any interpretation of §5103A(a)(1) that does not require the Secretary to produce the material relied upon in deciding a claim, or necessary to a claim, hogties Mr. Martinez's ability to even attempt a proof of his claim. Mr. Martinez can think of no scenario where it is to his benefit to have the Secretary decide his case before he ever gets to see the evidence the Secretary developed. Nor can he think of any reason to interpret the duty to assist to include a component of not assisting a veteran.

> "A decision by the VA to deny benefits in reliance on an examiner's opinion, while denying the veteran access to that examiner's credentials, ensures that the presumption [that VA doctors are legally qualified as experts] will work to the veteran's disadvantage." *Mathis v. Shulkin,* 137 S.Ct. 1994, 1995 (June 26, 2017)(J. Sotomayor, dissenting).
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> "The VA usually refuses to supply information that might allow a veteran to challenge the presumption [that VA doctors are legally qualified as experts] without an order from the Board of Veterans' Appeals. And that Board often won't issue an order unless the veteran can first supply a specific reason for thinking the examiner incompetent. No doubt this arrangement makes the VA's job easier. But how is it that an administrative agency may manufacture for itself or win from the courts a regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve?" *Mathis v. Shulkin,* 137 S.Ct. at 1995 (June 26, 2017)(J. Gorsuch, dissenting).

2 The Secretary deprived Mr. Martinez of his constitutional right to due process when he did not provide him with copies of material relied upon to deny benefits.

The 5th amendment of the US Constitution guarantees "[n]o person shall…be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend V. A claim of unconstitutional deprivation of property under the 5th amendment has 3 essential elements: 1) the claimant must be "deprived" of a protectable interest; 2) that deprivation must be due to some government action; and, 3) the deprivation must be without due process. *Cospito v. Heckler,* 742 F.2d 72, 80 (3rd Cir. 1984). The parties do not appear to dispute Mr. Martinez has a protected property right in service-connected disability compensation. *Cushman v. Shinseki,* 576 F.3d 1290 (Fed. Cir. 2009). Nor do they appear to dispute he was deprived of that right when the BVA denied service connection for sleep apnea. The only dispute is whether the deprivation was without due process: to resolve the dispute, the Supreme Court laid out a 3-part test. *Mathews v. Eldridge,* 424 U.S. 319, 341-349 (1976).

2.1 Because Mr. Martinez's potential deprivation exceeds $100,000 in past due benefits, *Mathews* Element 1 supports more process due the veteran.

The first consideration in the *Mathews* test is the nature of the interest that will be affected by the official action, "…in particular, the 'degree of potential deprivation that may be created.'" *Mathews*, 424 U.S. at 341-342.

Here, the potential deprivation is substantial. Mr. Martinez first filed his claim in 2005, and given facts known about his condition, he would receive a minimum 50% disability rating under the appropriate diagnostic code. *Accord,* 38 C.F.R. §4.97 (DC 6847); R. at 225, 252 – 254, 1255, 1256. Were he granted even that minimum rating, an approximation[11] of the amount of past due would be between $105,000 and $110,000:

From	**To**	**Effective Date**
40%	70%	April 2005 – September 2007
60%	90%	October 2007 – February 2011
90%	100%	March 2011 – January 2017

This amount of compensation is life changing to a veteran like Mr. Martinez who alleges he is unable to work due to his service connected disabilities. R. at 165- 166.

Even though Mr. Martinez's potential personal deprivation is substantial, a smaller financial deprivation to other veterans is no less significant a deprivation of quality of life for a disabled veteran. Sums paltry in comparison to the Secretary's own budget may make the difference between a veteran knowing where his next meal is coming from, whether he will have a roof over his head, whether she will have to sleep on the street homeless with her children tonight, or whether a veteran commits suicide out of desperation.

[11] Mr. Martinez does not assert this number as an exact amount of past-due he would recover: it is a rough approximation, using the VA's historical rating tables online, assuming he would be retroactively paid as a veteran with one dependent from April 2005 through the date of the BVA decision. It does not include any special monthly compensation that might be available, or an earlier entitlement to schedular TDIU benefits (R. at 165- 166), or any past due amount owed since the BVA decision issued in January 2017.

The potential deprivations articulated here do not consider these non-pecuniary losses or those like them, such as state or medical or employment benefits which might have been available to the veteran based on a higher rating, or any rating, for his sleep apnea.

Given the size of the potential financial deprivation, the enormity of the impact on a disabled veteran's quality of life, and other consequential but non-pecuniary deprivations, *Mathews* element 1 supports a conclusion that greater procedural protection is due a veteran. This conclusion is underscored by the *de minimis* procedural protection Mr. Martinez seeks: putting a stamp on an envelope and mailing the veteran and his attorney a timely copy of medical opinions the Secretary develops.

2.2 Because existing procedures do not safeguard Mr. Martinez ability to see the evidence the Secretary relied on, *Mathews* element 2 supports a greater process due the veteran.

The second consideration in the *Mathews* test is the " 'fairness and reliability' of the existing procedures and the 'probable value, if any, of additional procedural safeguards.' " *Mathews*, 424 U.S. at 343-347.

Only three (3) procedures exist to safeguard the veteran's ability to obtain a copy of the Secretary's medical opinion:

1) The veteran and his attorney's might, upon noticing mention of a medical opinion in a VA Ratings Decision, SOC, or SSOC, request a copy of that information from the VA;

2) The veteran and his attorney might sue the VA in Federal District Court to seek production of the documents under the Freedom of Information Act (FOIA);

3) The Veteran might file a Petition for Writ of Mandamus to this Court to seek production of documents.

The second option is neither reasonable nor realistic. While a federal district court would likely require the Secretary to give veterans copies of medical opinions in their own claims pursuant to a lawsuit on a FOIA request, such lawsuits take years to resolve, and require paying thousands of dollars in hourly attorney fees. Beyond that, a veteran should not have to pay thousands of dollars to an attorney to sue his government in federal district court, in order to procure the Secretary's evidence in a claims process which the Secretary touts as "non-adversarial", particularly where Congress imposed a duty on the Secretary to assist the claimant, and such assistance can be provided to a veteran at a *de minimis* cost.

This appeal demonstrates the real world futility of the other options. Mr. Martinez's representatives made 6 requests in 24 months for a copy of the C-File. Mr. Martinez used this Court's resources to seek extraordinary mandamus relief simply to get a copy of a C-File. There is still no reliable evidence any of these requests were ever fulfilled, or what was actually sent to the veteran. All the while, the Secretary refused to comply with multiple standing disclosure authorizations on his own form for such purpose, and refused to comply with the disclosure instructions in the Secretary's VA Form 21-22a.

The Secretary is expected to list the "usual suspects" to excuse his failure to give veterans the material he relies upon and necessary to their claims: administrative burdens, lack of resources, too many veterans, too many appeals, and so on. Such assertions should

be unsettling when viewed in light of the facts of this case: when the so-called "rubber met the road" – fear of an Order of this Court through issuance of a writ of mandamus – the Secretary includes evidence that suggests he can copy and mail a C-File in 2 days. *Accord, Appendix A,* R. at 883.

The simple fact is that the Secretary can produce material relied and necessary to deciding veterans' claims and he can do so without need for multiple unanswered requests for information over a 2 year period; he can do so without need for a veteran to strain the resources of this Court in proceedings for extraordinary relief, and he can do so within days or hours, not months or years. What stands in his way is nothing more or less than the force of law: a finding that veterans are legally due a process which requires the Secretary to produce the material he relies upon in deciding benefits claims, under either or both the 5th Amendment of the U.S. Constitution or, as argued above, under the statutory duty to assist the veteran "in obtaining evidence" necessary to his claim.

Because the current procedural mechanisms available to a veteran to obtain the evidence he seeks are unreasonable, costly, and expend this Court's limited resources, *Mathews* Element 2 weighs in favor of more process due veterans. The process Mr. Martinez seeks here – a simple requirement that the Secretary provide him with material relied upon to decide his claim before it is decided – is not only *de minimis* but well-entrenched in federal law governing other federal benefits processes.

2.3 In nearly every other federal benefits process, the public interest commands disclosure of the government's evidence against a claimant.

The third consideration of the *Mathews* test is the government's interest, the public interest, including the administrative burden and other societal costs. *Mathews,* 424 U.S. at 347 -349.

The government's interest in veterans' claim is "…not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them. *Barrett v. Nicholson,* 466 F.3d 1038, 1044 (Fed. Cir. 2006). The veterans' benefits "…scheme is imbued with special beneficence from a grateful sovereign." *Bailey v. West,* 160 F.3d 1360, 1370 (1998)(Michel, J., concurring in judgment but not opinion).

Mr. Martinez argues he is due only the most basic of process: his right to be given a copy of the evidence the Secretary has in his custody, which is necessary to his claim, and on which the Secretary relied in deciding his claim. This most basic process is in the interest of the government and the public, and outweighs any negligible cost of delivering a document to a veteran. This right is so important the Supreme Court demands zealous efforts to safeguard it:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-

> examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny (internal citations omitted)." *Greene v. McElroy,* 360 U.S. 474, 496-497 (1959).

Mr. Martinez is not asking this Court to apply the Sixth amendment to his claim. He argues the veteran who risked life and limb to serve his nation is due the same basic process now given to those accused of being his nation's enemy, corporations engaging in interstate commerce, welfare recipients and social security disability applicants. Mr. Martinez has found no other federal government benefit system where due process does not require the government to produce copies of the material it relies upon in denying a constitutionally protected interest. Examples to the contrary are plentiful.

An individual the US government accused of being an agent of the Taliban is entitled to have the evidence relied on in reaching its conclusion. *Hamdi v. Rumsfeld,* 542 U.S. 507, 533 (2006). In that case, the government produced only a single declaration by one government agent in support of its classification, arguing that "further factual exploration [wa]s unwarranted", and the court should "assume the accuracy of the [g]overnment's" facts. *Hamdi,* 524 U.S. at 527-528. Weighing a high risk of deprivation of a liberty interest against the minimally protective government process in that case, the Supreme Court held "…a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi,* at 533.

In a social security disability claim, the basic ability to prove entitlement to compensation is protected by an equally basic procedure: the beneficiary is "…afforded an opportunity to review the medical reports and other evidence in his case file" so he might "challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions". *Mathews,* 424 U.S. 319, 338, 346-347 (1976).

Even the VA adjudicator of Mr. Martinez's claim is due more process before he can be terminated from civil service, including "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story". *Cleveland v. Board of Education v. Loudermill*, 470 U.S. 532, 544-546 (1985).

When a corporation seeks to defend against government sanctions for alleged violations of an exchange program for alien workers, the government must advise the company of the evidence against it so as not to deprive the company of a meaningful opportunity to respond and rebut the government's evidence. *ASSE Int'l, Inc. v. Kerry,* 803 F.3d 1059, 1075 (9th Cir. 2015).

Even corporations acting in interstate commerce must be afforded the right to see and dispute government facts before the government deprives them of a right. *Accord, Interstate Commerce Commission v. Louisville & Nashville Railroad Co,* 227 U.S. 88 (1913); (When rights depend on facts, parties must have a chance to say and be heard on what those facts are); *Baltimore and Ohio Railroad Co. v. U.S.,* 264 U.S. 258, 263, 265 (1924)(to make an essential finding without supporting evidence is arbitrary action); *Ohio Bell Tel. Co. v Pub. Utils. Com.,* 301 U.S. 292, 302 (1937)(when "government reports are put in

evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect").

Before a welfare claimant is denied benefits, "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Goldberg,* 397 U.S. at 270, *quoting Greene,* 370 U.S. at 496-497.

It cannot be in the public interest to require the government to disclose material relied on by the government before depriving VA employees or alleged Taliban soldiers of life, liberty or property rights unless it is also in the public interest to disclose such material to the veteran served by the VA, and who served to fight enemies like the Taliban.

It cannot be in the public's interest to promote an inefficient judiciary. BVA judges must weigh facts: their competence, credibility, materiality, relevance, and weight. *Caluza v. Brown,* 7 Vet. App. 498, 506 (1995), *aff'd per curiam,* 78 F.3d 604 (Fed. Cir. 1996)(table). The BVA cannot weigh facts if a veteran cannot see the facts the Secretary develops, and the BVA cannot weigh facts if a veteran is actually or effectively barred from disputing the Secretary's facts. As a result of the failure of due process, many appeals come before this Court where a veteran has challenged the adequacy of the BVA's reasons and bases for relying on a medical opinion. If the veterans are able to see and challenge those opinions before the BVA decision issues, the BVA's decisions would necessarily be more reasoned, resulting in fewer joint remands vacating unreasoned BVA decisions. A decision supporting the basic process Mr. Martinez seeks here allows veterans to see and argue evidence before a BVA decision, improves the quality of reasoning in BVA decisions, reduces this Court's

docket and caseload, and allows the Court to expend fewer resources to oversee the churn of thousands of joint remands annually.

The Secretary is aware of evidence undisputedly relevant to Mr. Martinez's claim for service connection of his sleep apnea. Mr. Martinez asks only for a copy of the evidence before the BVA denies him disability compensation. He cannot get that evidence – he cannot obtain it - unless the Secretary gives it to him.

2.4 The Secretary's failure to provide this process is not harmless.

Harmless error consideration does apply, generally, to service connection appeals. *Gambill v. Shinseki,* 576 F.3d 1307, 1311 (Fed. Cir. 2009). However, the federal court system does not routinely or fully apply "harmless error" analysis to all, or even most, constitutional violations. *Chapman v. California,* 386 U.S. 18, 23-24 (1967)("[T]here are some constitutional rights so basic … that their infraction can never be treated as harmless error"). Harmless error standards are appropriate only when an error can be "quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless". *Arizona v. Fulminante,* 499 U.S. 209, 307-308 (1991).

Mr. Martinez's right to receive the material developed and relied upon by the Secretary, specifically opinion evidence against his claim, before being deprived of a constitutionally protected property right is so basic that its refusal can never be harmless – he could find no federal court which allowed the government to hide evidence it believes

supports deprivation of a basic property right behind the rule of harmless error. *Contrast, cases cited in Section 2.3, infra.*

It is impossible to quantitatively assess the degree to which the BVA decision might have been different if Mr. Martinez could have introduced: 1) facts or evidence challenging the VA examiner's competence, credibility, and methodology; 2) evidence or argument challenging the lack of reasoning or lack of reliance on sound scientific, medical and logical principles; and/or 3) evidence reaching different conclusions and reasoning on the facts.

To even begin this assessment would essentially require Mr. Martinez to try his case to this Court – a "trial by guess" of sorts – to determine if evidence Mr. Martinez might have submitted at the BVA in response to an exam he first saw in this appeal might have affected a fact-finding the BVA never performed and which this Court is statutorily forbidden to conduct. *See,* 38 U.S.C. §7261(c)(BVA findings of fact may not be subject to de novo trial at CAVC).

Harmless error does not apply to this constitutional violation, as it is impossible to quantitatively assess evidence pertaining to it – for the first time – on appeal to the CAVC.

VI. RELIEF REQUESTED.

Mr. Martinez asks for a panel decision of this Court holding that the Secretary's duty to "assist [him] in obtaining evidence", and/or the due process clause of the 5th Amendment require the Secretary to proactively give to him a copy of any medical opinions which the Secretary develops in his claims and appeals.

He asks the Court to vacate the BVA's denial of his service connection for his sleep apnea, and remand it to the BVA with instructions to produce copies of any such exams prior to the adjudication of any appeal.

DATED: MARCH 2, 2018

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on March 2, 2018, I caused Appellant's Principal Brief to be served on the Appellee by and through the Court's E-Filing system:

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DEPARTMENT OF VETERANS AFFAIRS

March 19, 2015

In Reply Refer To: 306/pct/pb
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MARTINEZ, Andre

ATTN: STACEY P CLARK, ESQ.
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Dear Mr. Clark Esq.:

This letter is in response to your Freedom of Information (FOIA)/ Privacy Act Request dated **March 6, 2015.**

We have enclosed a copy of the veteran's Claim Folder as requested.

If you should choose to appeal, your appeal must be in writing and postmarked within sixty (60) calendar days of any initial decision to deny your request. It must state clearly why you disagree with determination to withhold the records. Both the front of the envelope and the appeal letter should contain the notation: "Freedom of Information Act Appeal." Send your appeal to:

Department of Veterans Affairs
General Counsel (024)
810 Vermont Avenue, NW
Washington, DC 20420

Fax: (202) 273-6388
Email: ogcfoiaappeals@va.gov

Our statewide telephone number is: 1-800-827-1000.

Sincerely yours,

FOIA-Privacy Act Officer

Encl: cc Claim Folder

cc: Andre Martinez

106TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 106–781

VETERANS CLAIMS ASSISTANCE ACT OF 2000

JULY 24, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STUMP, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany H.R. 4864]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 4864) to amend title 38, United States Code, to reaffirm and clarify the duty of the Secretary of Veterans Affairs to assist claimants for benefits under laws administered by the Secretary, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Veterans Claims Assistance Act of 2000".

SEC. 2. CLARIFICATION OF DEFINITION OF "CLAIMANT" FOR PURPOSES OF VETERANS LAWS.

(a) IN GENERAL.—Chapter 51 of title 38, United States Code, is amended by inserting before section 5101 the following new section:

"§ 5100. Definition of 'claimant'

"For purposes of this chapter, the term 'claimant' means any individual applying for, or submitting a claim for, any benefit under the laws administered by the Secretary.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting before the item relating to section 5101 the following new item:

"5100. Definition of 'claimant'."

SEC. 3. ASSISTANCE TO CLAIMANTS.

(a) REAFFIRMATION AND CLARIFICATION OF DUTY TO ASSIST.—Chapter 51 of title 38, United States Code, is amended by striking sections 5102 and 5103 and inserting the following:

79-006

"§ 5102. Applications: forms furnished upon request; notice to claimants of incomplete applications

"(a) FURNISHING FORMS.—Upon request made in person or in writing by any person claiming or applying for a benefit under the laws administered by the Secretary, the Secretary shall furnish such person, free of all expense, all such printed instructions and forms as may be necessary in establishing such claim.

"(b) INCOMPLETE APPLICATIONS.—If a claimant's application for a benefit under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the application. The Secretary shall notify each claimant of any additional information and medical and lay evidence necessary to substantiate the claim. As part of such notice, the Secretary shall indicate which portion of such evidence, if any, is to be provided by the claimant and which portion of such evidence, if any, the Secretary will attempt to obtain on behalf of the claimant.

"(c) TIME LIMITATION.—In the case of evidence that the claimant is notified is to be provided by the claimant, if such evidence is not received by the Secretary within one year from the date of such notification, no benefits may be paid or furnished by reason of such application.

"(d) INAPPLICABILITY TO CERTAIN BENEFITS.—This section shall not apply to any application or claim for Government life insurance benefits.

"§ 5103. Applications: Duty to assist claimants

"(a) DUTY TO ASSIST.—The Secretary shall make reasonable efforts to assist in obtaining evidence necessary to establish a claimant's eligibility for a benefit under a law administered by the Secretary. However, the Secretary 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), the Secretary shall make reasonable efforts to obtain relevant 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 records sought, the Secretary shall inform the claimant that the Secretary is unable to obtain such records. Such a notice shall—

"(A) specifically identify the records the Secretary is unable to obtain;

"(B) briefly explain the efforts that the Secretary made to obtain those records;

"(C) describe any further actions to be taken by the Secretary with respect to the claim; and

"(D) request the claimant, if the claimant intends to attempt to obtain such records independently, to so notify the Secretary within a time period to be specified in the notice.

"(c) OBTAINING RECORDS FOR COMPENSATION CLAIMS.—In the case of a claim by a veteran for disability compensation, the assistance provided by the Secretary under subsection (a) shall include obtaining the following records if relevant to the veteran's claim:

"(1) The claimant's existing service medical records and, if the claimant has furnished information sufficient to locate such records, other relevant service records.

"(2) Existing records of relevant medical treatment or examination of the veteran at Department health-care facilities or at the expense of the Department, if the claimant has furnished information sufficient to locate such records.

"(3) Information as described in section 5106 of this title.

"(d) MEDICAL EXAMINATIONS FOR COMPENSATION CLAIMS.—In the case of a claim by a veteran for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination, or obtaining a medical opinion, when the evidence of record before the Secretary—

"(1) establishes that—

"(A) the claimant has—

"(i) a current disability;

"(ii) current symptoms of a disease that may not be characterized by symptoms for extended periods of time; or

"(iii) persistent or recurrent symptoms of disability following discharge or release from active military, naval, or air service; and

"(B) there was an event, injury, or disease (or combination of events, injuries, or diseases) during the claimant's active military, naval, or air service capable of causing or aggravating the claimant's current disability or symptoms, but

"(2) is insufficient to establish service-connection of the current disability or symptoms.

"(e) REGULATIONS.—The Secretary shall prescribe regulations to carry out this section. Such regulations shall include provisions for—

"(1) specifying the evidence necessary under subsection (a) to establish a claimant's eligibility for a benefit under a law administered by the Secretary; and

"(2) determining under subsections (b) and (c) what records are relevant to a claim.

"(f) RULE WITH RESPECT TO DISALLOWED CLAIMS.—Nothing in this section shall be construed to require the Secretary to reopen a claim that has been disallowed except when new and material evidence is presented or secured, as described in section 5108 of this title.

"(g) OTHER ASSISTANCE NOT PRECLUDED.—Nothing in this section shall be construed as precluding the Secretary from providing such other assistance to a claimant as the Secretary considers appropriate.".

(b) REENACTMENT OF RULE FOR CLAIMANT'S LACKING A MAILING ADDRESS.—Chapter 51 of such title is amended by adding at the end the following new section:

"§ 5126. Benefits not to be denied based on lack of mailing address

"Benefits under laws administered by the Secretary may not be denied a claimant on the basis that the claimant does not have a mailing address.".

(c) CLERICAL AMENDMENTS.—The table of sections at the beginning of chapter 51 of such title is amended—

(1) by striking the items relating to sections 5102 and 5103 and inserting the following:

"5102. Applications: forms furnished upon request; notice to claimants of incomplete applications.
"5103. Applications: duty to assist claimants.";

and

(2) by adding at the end the following new item:

"5126. Benefits not to be denied based on lack of mailing address.".

SEC. 4. BURDEN OF PROOF.

(a) REPEAL OF "WELL-GROUNDED CLAIM" RULE.—Section 5107 of title 38, United States Code, is amended to read as follows:

"§ 5107. Burden of proof; benefit of the doubt

"(a) BURDEN OF PROOF.—Except when otherwise provided by this title or by the Secretary in accordance with the provisions of this title, a claimant shall have the burden of proving entitlement to benefits.

"(b) BENEFIT OF THE DOUBT.—The Secretary shall consider all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary and shall give the claimant the benefit of the doubt when there is an approximate balance of positive and negative evidence regarding any issue material to the determination of the matter.".

SEC. 5. PROHIBITION OF CHARGES FOR RECORDS FURNISHED BY OTHER FEDERAL DEPARTMENTS AND AGENCIES.

Section 5106 of title 38, United States Code, is amended by adding at the end the following new sentence: "No charge may be imposed by the head of any such department or agency for providing such information.".

SEC. 6. EFFECTIVE DATE.

(a) IN GENERAL.—Except as specifically provided otherwise, the provisions of section 5107 of title 38, United States Code, as amended by section 4 of this Act, apply to any claim—

(1) filed on or after the date of the enactment of this Act; or

(2) filed before the date of the enactment of this Act and not final as of the date of the enactment of this Act.

(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 any claim for benefits—

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

(B) which was denied or dismissed 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),

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 such denial or dismissal had not been made.

(2) A claim may not be readjudicated under this subsection unless the request is filed or the motion made not later than two years after the date of the enactment of this Act.

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

INTRODUCTION

On July 17, 2000, the Chairman and Ranking Member of the Veterans' Affairs Committee, the Honorable Bob Stump and the Honorable Lane Evans, along with the Chairman and Ranking Member of the Subcommittee on Benefits, the Honorable Jack Quinn and the Honorable Bob Filner, introduced H.R. 4864 to amend title 38, United States Code, to reaffirm and clarify the duty of the Secretary of Veterans Affairs to assist claimants for benefits under laws administered by the Secretary, and for other purposes.

On March 23, 2000, the Subcommittee on Benefits held a hearing on the subject of "well-grounded" claims and H.R. 3193, the Duty to Assist Veterans Act of 1999, introduced by the Honorable Lane Evans and others. Witnesses testifying included: Mr. Richard Schneider, Non Commissioned Officers Association; Mr. Leonard Selfon, Esq., Vietnam Veterans of America; Mr. Rick Surratt, Disabled American Veterans; Mr. Carroll Williams, The American Legion; Mr. Geoff Hopkins, Paralyzed Veterans of America; Mr. John McNeill, Veterans of Foreign Wars of the United States; and Honorable Joseph Thompson, Under Secretary for Benefits, Veterans Benefits Administration.

Mr. Joseph Thompson testified about VA's role in assisting veterans filing claims for benefits and the Department's proposed rules, as a result of the *Morton* v. *West* decision, relevant to the concept of well-grounded claims and VA's statutory duty to assist claimants in the claim process. The veterans service organization witnesses adamantly opposed VA's regulations, and testified that VA did not have the authority to make the changes proposed in regulation.

SUMMARY OF THE REPORTED BILL

H.R. 4864, as amended, would:

1. Authorize the Secretary of Veterans Affairs to assist a claimant in obtaining evidence to establish entitlement to a benefit.
2. Eliminate the requirement that a claimant submit a "well-grounded" claim before the Secretary can assist in obtaining evidence. (In the context of claims for service-connected disability benefits, a "well-grounded" claim is one that has evidence of in-service injury or disease, a diagnosis of a current disability or disease, and a medical opinion that the current disability or disease is related to the in-service injury or disease).
3. For most kinds of claims, require the Secretary to make reasonable efforts to obtain relevant records that the claimant identifies and authorizes the Secretary to obtain.
4. For service-connected disability compensation claims, require the Secretary to (a) obtain existing service medical records and other Department treatment records, (b) obtain relevant

records in the control of federal agencies, and (c) provide a medical examination if the Secretary finds that the veteran has a current disability or symptoms and there is evidence to suggest that it may be related to an event, injury, or disease which took place in service.

5. Define a "claimant" who would be eligible to receive assistance from the Secretary as any person seeking veterans' benefits.
6. Require other Federal agencies to furnish relevant records to the Department at no cost to the claimant.
7. Permit veterans who had claims denied or dismissed after the Court of Appeals for Veterans Claims decision in *Morton* v. *West* to request review of those claims within a two year period following enactment.

BACKGROUND AND DISCUSSION

As the Committee has noted, the Department of Veterans Affairs' system for deciding benefits claims "is unlike any other adjudicative process. It is specifically designed to be claimant friendly. It is non-adversarial; therefore, the VA must provide a substantial amount of assistance to a veteran seeking benefits."[1] This assistance includes requesting service records, medical records, and other pertinent documents from sources identified by the claimant. VA also provides medical examinations, when appropriate, to diagnose or evaluate physical and mental conditions. The claims adjudication process inevitably involves some subjective judgment in evaluating the evidence in an individualized case. While VA regional offices historically requested service medical records and documentary evidence in the possession of VA medical facilities on claims, the extent to which a claim is developed more fully to include a VA examination or requesting private medical records differs among VA's regional offices depending on the subjective determination of the claims examiner that a particular claim is not well-grounded. In such cases, often involving claims filed many years after discharge from military service, a claimant may be requested to provide additional information before an examination is scheduled and full development of the claim is undertaken.[2]

As a result of court decisions construing the meaning of section 5107 of title 38, United States Code, concerning "well-grounded" claims and the Secretary's "duty to assist" a veteran in obtaining evidence in support of a claim, the VA is no longer able to provide assistance to veterans as it has in the past. These decisions have led to substantial differences among VA regional offices in the handling of claims which lack one or more of the elements needed to "well-ground" a claim as that term has been defined by the United States Court of Appeals for Veterans Claims (CAVC). Testimony before the Committee and review of files by Committee staff has indicated confusion on the part of VA adjudicators concerning the meaning and application of the "well-grounded" claim requirement. An understanding of the CAVC's development of the well-grounded

[1] H.R. Rept. No. 105–52, at 2 (1997).
[2] Duty to Assist Veterans Act of 1999: Hearings on H.R. 3193 Before the Subcomm. on Benefits of the House Veterans' Affairs Committee, 106th Cong. 1–2 (2000) (statement of Joseph Thompson, Under Secretary for Benefits, Department of Veterans Affairs).

claim concept is needed to understand VA's current policy on this issue.

JUDICIAL CONSTRUCTION OF "WELL-GROUNDED" CLAIM AND "DUTY TO ASSIST"

Soon after its establishment, the CAVC was confronted with the necessity to construe the meaning of section 5107, particularly the undefined term, "well-grounded" claim.[3] In *Gilbert* v. *Derwinski*, 1 Vet. App. 49 (1990), the Court established a baseline for veterans' claims adjudication. In this case, the Court read the language of section 5107 as creating a "chronological" order for the submission of evidence which constitutes a "well-grounded" claim and the triggering of the Secretary's "duty to assist."

> Read together, § 3007(a) and (b) [now codified at § 5107(a) and (b)] establish and allocate chronological obligations. Pursuant to § 3007(a) the initial obligation rests with the veteran: "A person who submits a claim . . . shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." Under § 3007(b) the "benefit of the doubt" rule does not shift "from the claimant to the [Secretary]" the initial burden to submit a facial valid claim. Thus, the submission of a facially valid claim is necessary; inherently incredible allegations of injury would obviously not suffice.

Id. at 55 (citing 38 U.S.C. § 3007 now codified at § 5107).

In that same year, *Murphy* v. *Derwinski*, 1 Vet. App. 78 (1990), refined the Court's definition of a "well-grounded" claim.[4] Understanding the infancy of the Court and limited precedent case law, the Court pointed to the fact that:

> [b]ecause a well grounded claim is neither defined by the statute nor the legislative history, it must be given a common sense construction. A well grounded claim is a plausible claim, one which is meritorious on its own or capable of substantiation. Such a claim need not be conclusive but only possible to satisfy the initial burden of § 3007(a) (now codified at 38 U.S.C. § 5107(a)).

Id. at 81.

The Court was also confronted with the issue of deciding what the Secretary's "duty to assist" entailed:

> When a claimant submits a properly filled out and executed VA form 21–526, Veteran's Application for Compensation and Pension, the Secretary has the veteran's biographical, family, medical, and service data. This information will enable the Secretary to fulfill his 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', the Secretary would be able to request

[3] *Id.*, at 4.
[4] *Id*

them from the claimant or, upon authorization, obtain them directly.

Murphy at 82 (quoting S. Rept. No. 100–418, at 33–34 (1988)).

"The Court has held that while the evidence to make a claim well-grounded need not be conclusive, the statutory scheme 'requires more than just an allegation; a claimant must submit supporting evidence' that a claim is plausible."[5] The meaning of "supporting evidence," in turn, was refined by subsequent Court decisions. A 1993 Court decision held that "[w]here the determinative issue involves medical causation or a medical diagnosis, competent medical evidence to the effect that the claim is 'plausible' or 'possible' is required." *Grottveit* v. *Brown*, 5 Vet. App. 91, 93 (1993).

As a result of these and other Court decisions, the understanding of a "well-grounded" claim evolved so that it included a requirement for the submission of medical evidence from a claimant who was seeking benefits for a medical condition claimed to be related to service. The lack of such medical evidence in the claim led the Grottveit Court to conclude that the claim "was not one on which relief could be granted; there was no claim to adjudicate on the merits."[6]

In *Grivois* v. *Brown*, 6 Vet. App. 136 (1994), the CAVC stated that it is the duty of VA claims examiners who first review a claim to apply the "well-grounded" test "for it is their duty to avoid adjudicating implausible claims at the expense of delaying well-grounded ones." The CAVC noted that the statutory scheme recognizes that not all claims filed for VA benefits will be meritorious, and that section 5107(a) "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 are well grounded.[7] The Court warned that "while no duty to assist arises absent a well-grounded claim, if the Secretary, as a matter of policy, volunteers assistance to establish well groundedness, grave questions of due process can arise if there is apparent disparate treatment between claimants in this regard."[8]

VA's response to this case was to revise its procedure manual in January 1994 instructing field offices to fully develop claims before deciding whether they are "well-grounded," including requesting service medical records, VA and other government records, and private records identified by the claimant as relevant to the claim. VA's policy was based on an understanding that although it may not do less than the statute requires, it was not prohibited from doing more than the statute requires.[9]

In 1995, the CAVC defined the specific requirements which would "well-ground" a claim for service connection. In *Caluza* v. *Brown*, 7 Vet. App. 498, 506 (1995) aff'd, 78 F.3d 604 (Fed. Cir. 1996), the Court held that "in order for a claim to be well-grounded, there must be competent evidence [1] of current disability (a medical diagnosis) . . . ; [2] of incurrence or aggravation of a disease or injury in service (lay or medical evidence) . . . ; [3] and of a nexus between the in-service injury or disease and the current

[5] *Id.*, at 5, quoting *Tirpak* v. *Derwinski*, 2 Vet. App. 609, 610 (1992).
[6] *Id.*, at 6.
[7] *Id.*, at 7.
[8] *Id.*, at 7, quoting *Grivois* at 139–140.
[9] *Id.*, at 7–8.

disability (medical evidence)." The United States Court of Appeals for the Federal Circuit affirmed that holding in *Epps* v. *Gober*, 126 F.3d 1464 (Fed. Cir. 1997). These three basic elements or requirements have become a standard that a claimant must show in order to establish entitlement to compensation under 38 U.S.C. §1110.[10] Nonetheless, believing that the statute did not prohibit VA from volunteering assistance, the 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.[11]

The VA position of providing assistance to claimants who had not filed "well-grounded" claims was challenged by the CAVC in *Morton* v. *West*, 12 Vet. App. 477 (1999), decided on July 14, 1999. In *Morton*, the claimant argued that the VA had created a blanket exception to the "well-grounded" claim requirement of section 5107(a). Citing VA's internal procedures manual, the claimant argued that the VA had obligated itself to fully develop all claims, regardless of whether they were "well-grounded." He asserted that those manual provisions were valid exercises of the Secretary's authority to create exceptions under the "[e]xcept when otherwise provided" clause in the first sentence of section 5107(a).[12]

The CAVC rejected those assertions for two reasons. First, it concluded that the manual provisions at issue were merely internal statements of policy or interpretation which could not be enforced against VA. Second, CAVC concluded that if the manual provisions were interpreted as establishing a blanket exception to the statute, such an interpretation would be inconsistent with section 5107(a). Additionally, the Court reiterated its prior holding that section 5107 reflects a Congressional policy that implausible claims should not consume VA's limited resources and force "well-grounded" claims into ever greater backlog and delay. . . . *Morton*, which is currently on appeal to the Federal Circuit, required the Compensation and Pension Service to respond with a formal change in its policy.[13]

In August 1999, the Department of Veterans Affairs issued a letter informing each VA regional office that a number of provisions in their procedural manual were being rescinded as the result of the *Morton* decision. The August 1999 letter instructed regional offices to follow an interim policy implementing the *Morton* decision pending proposed rulemaking, specifically directing them to: determine whether or not claims are "well-grounded" prior to beginning development; give notice to claimant if material evidence is necessary; and obtain VA medical and service records, but refrain from private treatment records or scheduling a VA examination on claims which are not "well-grounded." On December 2, 1999, VA proposed a new rule setting forth the circumstances in which it would obtain relevant records or provide medical examinations even if the claimant had not submitted a "well-grounded" claim.[14] 64 Fed. Reg. 67528 (1999) (proposed Dec. 2, 1991). As noted, witnesses at the March 23, 2000, hearing challenged the VA's author-

[10] *Id.*, at 8.
[11] *Id.*
[12] *Id.*, at 10.
[13] *Id.*, at 10–11.
[14] *Id.*, at 11–12.

ity to issue these regulations and criticized the proposed rules for failing to provide enough assistance to claimants.

Historically, the Secretary's "duty to assist" has been interpreted in varying fashions, but the goal is and has been to assist veterans in developing claims and receiving benefits for which they are eligible. As questions abound over the proper role of veterans and the VA in claim development, the Committee finds that it is necessary to clarify claimants' and the VA's duties with respect to obtaining evidence in support of claims for veterans benefits.

SECTION-BY-SECTION ANALYSIS

Section 1 would provide that this Act may be cited as the "Veterans Claims Assistance Act of 2000".

Section 2 would amend chapter 51 of title 38, United States Code, to add a new section at the beginning of the chapter. The new section would define the term "claimant" as that term is used in chapter 51. The term "claimant" would be defined to mean "any individual applying for, or submitting a claim for, any benefit under the laws administered by the Secretary". The purpose of defining this term is to ensure that the Secretary will provide applications and assistance to persons whose status as a veteran is not yet determined. Similarly, the Secretary would be obligated to respond to applications by persons who claim eligibility for or entitlement to a VA benefit by reason of their relationship to a veteran.

Section 3 would substantially revise sections 5102 and 5103 of title 38, United States Code.

As revised, section 5102 would contain almost all of existing sections 5102 and 5103. Subsection (a) of the proposed section 5102(a) is identical to existing section 5102. Subsections (b), (c), and (d) are, with one exception, identical to existing subsections (a) and (b) of existing section 5103. Proposed section 5102(b) restates the Secretary's obligation to send notices to the claimant and the claimant's representative, and to advise the claimant and the claimant's representative as to information the claimant must submit to complete the application. The Secretary would also be required to notify the claimant (and the claimant's representative) of any additional information and medical and lay evidence necessary to substantiate the claim. It is the Committee's understanding that the Secretary currently undertakes to provide this notification to a claimant, and that codification of this requirement should result in a more uniform practice of notifying a claimant of what evidence he or she must provide to the Department. For example, the Committee expects that information and evidence under the claimant's control such as birth and marriage evidence, school attendance and income information should ordinarily be provided by the claimant. Information and evidence in the control of governmental entities and medical providers should ordinarily be obtained directly by the Secretary.

Proposed subsection (a) of the new section 5103 is a revision of language currently found in section 5107(a) of title 38, United States Code, which requires the Secretary to assist claimants who have filed a "well-grounded" claim. As revised, the Secretary's duty to assist claimants would not be contingent on the claimant filing a claim that is "well-grounded." That is, the Secretary would be obligated to assist a claimant in obtaining evidence that is necessary

to establish eligibility for the benefit being sought. This language recognizes the Secretary's authority to establish differing evidentiary requirements for the various benefits administered by the Department. It also recognizes that certain claims, including those that on their face seek benefits for ineligible claimants (such as a veteran who seeks pension benefits but lacks wartime service), or claims which have been previously decided on the same evidence can be decided without providing any assistance or obtaining any additional evidence, and authorizes the Secretary to decide those claims without providing any assistance under this subsection.

Proposed subsection (b) of the new section 5103 clarifies the Secretary's obligation to assist a claimant in obtaining evidence that is relevant to a particular claim. The requirement in section 5107 that the claimant has the burden of proving entitlement to benefits would not be changed by this language. In using the term "reasonable efforts" to describe the Secretary's obligation to assist in obtaining evidence, the Committee expects the Department to use a practical approach to assisting a claimant in obtaining evidence. That is, if the claimant has adequately identified the source of the evidence and has given whatever permission is required for the custodian to provide such evidence, the Committee expects the Secretary to make repeated, but not necessarily exhaustive, efforts to obtain the evidence. In this regard, the Committee notes that one effort to obtain evidence would be clearly inadequate and that four efforts, except in an unusual case, would be exhaustive. Subsection (b) would also require the Secretary to provide notice to the claimant if the effort to obtain evidence is unsuccessful and briefly explain the Secretary's efforts to obtain such evidence, describe any further actions to be taken by the Secretary, and allow the claimant a reasonable opportunity to obtain the evidence before the claim is decided.

Proposed subsection (c) of section 5103 would provide special rules for obtaining evidence in disability compensation claims. For this type of claim, the Secretary would be obligated to obtain existing service medical records, records of treatment or examination at Department health-care facilities, and relevant records in the possession of other Federal agencies if relevant to the veteran's claim. The limitation of "reasonableness" would not apply to the Secretary's obligation to obtain these types of records if they exist and the claimant has furnished sufficient information to locate such records.

Proposed subsection (d) would require the Secretary to provide a medical examination or obtain a medical opinion if the Secretary has evidence establishing that (1) the claimant has (A) a current disability, (B) current symptoms of a disease (such as hepatitis C or post-traumatic arthritis) which may not be characterized by symptoms for extended periods of time, or (C) persistent or recurrent symptoms of disability following discharge from service, and 2) there was an in-service event (or series of events) which could have caused or aggravated the current disability or symptoms, but 3) the evidence is insufficient to establish service-connection. It is the Committee's understanding that the Department requests and obtains in appropriate cases, as part of the report of a medical examination, the examiner's opinion as to whether there is a "nexus" or linkage between the current disability or symptoms and some in-

service event or events. This section is intended to encourage that practice. However, this provision would not require VA to provide an examination where the evidence of record establishes service connection on the basis of applicable presumptions or other laws. The Committee expects the Secretary to continue the current practice of obtaining a medical examination, if needed, to establish the rating to be assigned to a service-connected disability.

Proposed subsection (e) would require the Secretary to prescribe regulations (1) specifying the evidence needed to establish a claimant's eligibility for a benefit, and (2) determining what records or evidence are relevant to a claim. The Committee notes that this subsection would not require the Secretary to prescribe new regulations except to the extent that existing regulations are incomplete, impractical, or inconsistent with the requirements of this Act.

Proposed subsection (f) of section 5103 would specify that nothing in this legislation would affect the requirement in current section 5108 that the Secretary reopen a claim and review the former disposition of the claim only if new and material evidence is presented by the claimant or is secured from a source which previously was unable to produce such evidence.

Proposed subsection (g) of section 5103 would clarify that nothing in this revised section should be construed as limiting the Secretary's authority to provide assistance to claimants. The Committee's intent is to overrule that portion of the decision in *Morton* that found an implied limitation on VA's authority to provide assistance to claimants who had not submitted "well-grounded" claims.

Proposed section 3(b) of the bill would recodify the language presently found at section 5103(c) as a new section 5126 of title 38, United States Code. Although there is no evidence that VA has ever denied a benefit to a person because that person lacked a mailing address, the Committee is retaining this language because of concern that a repeal of it might lead some future VA official to propose such a policy.

Section 4 would revise section 5107 of title 38, United States Code, to eliminate the requirement that a veteran must submit a "well-grounded" claim. In general, the proposed revision to section 5103 discussed above sets out the authority for the Secretary to provide assistance to a claimant. Thus, the extent to which the Secretary conducts a separate threshold examination of the evidence provided in support of a claim is now addressed in that section. The revised section 5107 restates without any substantive change the requirements in existing law that the claimant still has the burden of proving entitlement to benefits, and that the Secretary must provide the benefit of the doubt to the claimant when there is an approximate balance of positive and negative evidence regarding any material issue.

Section 5 would add a new sentence to section 5106 of title 38, United States Code, to provide that Federal departments or agencies shall furnish the Department of Veterans Affairs with records pertinent to a benefits application without charge.

Section 6 provides that in general, this Act would apply to claims filed after the date of enactment or which have not been finally decided as of that date. Subsection (b) would establish a special rule providing retroactive relief to claims which were finally denied or

which were dismissed as not "well-grounded" beginning on July 14, 1999 (the effective date of the *Morton* decision). In such cases, the Secretary could order the claim to be readjudicated upon the request of the claimant or on the Secretary's own motion. Subsection (b)(3) would provide that a motion to readjudicate the claim would have to be made within two years from the date of enactment of this Act, while subsection (b)(4) would relieve the Secretary of any obligation to locate and readjudicate claims which might be affected by the change in law described in this subsection.

OVERSIGHT FINDINGS

No oversight findings have been submitted to the Committee by the Committee on Government Reform.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The following letter was received from the Congressional Budget Office concerning the cost of the reported bill:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 21, 2000.

Hon. BOB STUMP,
Chairman, Committee on Veterans' Affairs,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4864, the Veterans Claims Assistance Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Evan Christman.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure.

H.R. 4864—Veterans Claims Assistance Act of 2000

Summary: H.R. 4864 would require the Department of Veterans Affairs (VA) to provide assistance to veterans who file claims for VA benefits. CBO estimates that implementing the bill would cost $4 million in 2001 and $7 million to $8 million annually thereafter, assuming appropriation of the necessary funds. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. H.R. 4864 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of the bill is shown in the following table. The costs of this legislation fall within budget function 700 (veterans benefits and services).

Basis of estimate: H.R. 4864 would require VA to provide more assistance than it does under current law to veterans who file claims for benefits. The bill would require VA to pursue any records the Secretary identifies as necessary to establish a claim, and it would require VA to draft regulations that specify what information is necessary for a claim. H.R. 4864 would direct VA to

inform veterans of any information the VA needs to adjudicate an incomplete claim, pursue information the veteran authorizes or requests the VA to obtain, and inform the veteran when the department cannot locate information pertinent to a claim.

If relevant for claims to disability compensation, VA would be required to obtain pertinent records, including a veteran's medical record from military service, his or her service record, any records of treatment provided by the VA, and any other relevant materials available from other federal agencies. The bill also would require VA to provide medical exams to veterans who need them to substantiate their claims. Also, the bill would allow any claimant who had a claim denied since July 14, 1999, to resubmit it if the claim was denied because it lacked sufficient evidence.

	By fiscal year, in millions of dollars—					
	2000	2001	2002	2003	2004	2005
SPENDING SUBJECT TO APPROPRIATION						
Spending under current law for VA's general operating expenses:						
Estimated authorization level [1]	941	941	941	941	941	941
Estimated outlays	925	941	941	941	941	941
Proposed changes:						
Estimated authorization level	0	4	7	8	8	8
Estimated outlays	0	4	7	7	8	8
Spending under H.R. 4864 for VA's general operating expenses:						
Estimated authorization level [1]	941	945	948	949	949	949
Estimated outlays	925	945	948	948	949	949

[1] The 2000 level is the amount appropriated for that year.

Note.—This table assumes that funding under current law will remain at the level appropriated for 2000 without adjustment for inflation. If funding over the 2001–2005 period is adjusted for inflation, the base amounts would increase by about $35 million a year, but the cost of the proposed changes would remain as shown under "Proposed Changes."

CBO expects that, in order to carry out its responsibilities under H.R. 4864, VA would have to hire additional claims adjudicators. Based on information from the VA, CBO assumes that 110 additional claims adjudicators would be hired at an estimated cost of $3 million in salary and benefits in 2001 and about $7 million annually thereafter. CBO estimates that training would cost about $1 million a year and that one-time costs associated with expanding the claims processing staff would be about $700,000 in 2001. The cost of providing medical exams is covered under current law. CBO does not expect a significant increase in benefit payments as a result of this bill.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: H.R. 4864 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Previous CBO estimate: On February 23, 2000, CBO transmitted a cost estimate for H.R. 3193, the Duty to Assist Veterans Act of 1999. That bill and H.R. 4864 are similar, but not identical. The estimated costs are the same, however, because CBO believes that VA would implement them substantially the same way.

Estimate prepared by: Federal costs: Evan Christman; impact on State, local, and tribal governments: Susan Seig Tompkins; impact on the private sector: Rachel Schmidt.

Estimate approved by: Robert A. Sunshine, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

The enactment of the reported bill would have no inflationary impact.

APPLICABILITY TO LEGISLATIVE BRANCH

The reported bill would not be applicable to the legislative branch under the Congressional Accountability Act, Public Law 104–1, because the bill would only affect Department of Veterans Affairs programs and benefits recipients.

STATEMENT OF FEDERAL MANDATES

The reported bill would not establish a federal mandate under the Unfunded Mandates Reform Act, Public Law 104–4.

STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to Article I, section 8 of the United States Constitution, the reported bill is authorized by Congress' power to "provide for the common Defense and general Welfare of the United States."

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

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PART IV—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS

SUBCHAPTER I—CLAIMS

Sec.
5100. Definition of "claimant".
5101. Claims and forms.
[5102. Application forms furnished upon request.
[5103. Incomplete applications.]
5102. Applications: forms furnished upon request; notice to claimants of incomplete applications.
5103. Applications: duty to assist claimants.

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5126. Benefits not to be denied based on lack of mailing address.

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SUBCHAPTER I—CLAIMS

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§ 5100. Definition of "claimant"

For purposes of this chapter, the term "claimant" means any individual applying for, or submitting a claim for, any benefit under the laws administered by the Secretary.

* * * * * * *

[§ 5102. Application forms furnished upon request

[Upon request made in person or in writing by any person claiming or applying for benefits under the laws administered by the Secretary, the Secretary shall furnish such person, free of all expense, all such printed instructions and forms as may be necessary in establishing such claim.

[§ 5103. Incomplete applications

[(a) If a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application. If such evidence is not received within one year from the date of such notification, no benefits may be paid or furnished by reason of such application.

[(b) This section shall not apply to any application or claim for Government life insurance benefits.

[(c) Benefits under laws administered by the Secretary may not be denied an applicant on the basis that the applicant does not have a mailing address.]

§ 5102. Applications: forms furnished upon request; notice to claimants of incomplete applications

(a) FURNISHING FORMS.—Upon request made in person or in writing by any person claiming or applying for a benefit under the laws administered by the Secretary, the Secretary shall furnish such person, free of all expense, all such printed instructions and forms as may be necessary in establishing such claim.

(b) INCOMPLETE APPLICATIONS.—If a claimant's application for a benefit under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the application. The Secretary shall notify each claimant of any additional information and medical and lay evidence necessary to substantiate the claim. As part of such notice, the Secretary shall indicate which portion of such evidence, if any, is to be provided by the claimant and which portion of such evidence, if any, the Secretary will attempt to obtain on behalf of the claimant.

(c) TIME LIMITATION.—In the case of evidence that the claimant is notified is to be provided by the claimant, if such evidence is not received by the Secretary within one year from the date of such notification, no benefits may be paid or furnished by reason of such application.

(d) INAPPLICABILITY TO CERTAIN BENEFITS.—This section shall not apply to any application or claim for Government life insurance benefits.

§ 5103. Applications: Duty to assist claimants

(a) DUTY TO ASSIST.—The Secretary shall make reasonable efforts to assist in obtaining evidence necessary to establish a claimant's eligibility for a benefit under a law administered by the Secretary. However, the Secretary 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), the Secretary shall make reasonable efforts to obtain relevant 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 records sought, the Secretary shall inform the claimant that the Secretary is unable to obtain such records. Such a notice shall—

(A) specifically identify the records the Secretary is unable to obtain;

(B) briefly explain the efforts that the Secretary made to obtain those records;

(C) describe any further actions to be taken by the Secretary with respect to the claim; and

(D) request the claimant, if the claimant intends to attempt to obtain such records independently, to so notify the Secretary within a time period to be specified in the notice.

(c) OBTAINING RECORDS FOR COMPENSATION CLAIMS.—In the case of a claim by a veteran for disability compensation, the assistance provided by the Secretary under subsection (a) shall include obtaining the following records if relevant to the veteran's claim:

(1) The claimant's existing service medical records and, if the claimant has furnished information sufficient to locate such records, other relevant service records.

(2) Existing records of relevant medical treatment or examination of the veteran at Department health-care facilities or at the expense of the Department, if the claimant has furnished information sufficient to locate such records.

(3) Information as described in section 5106 of this title.

(d) MEDICAL EXAMINATIONS FOR COMPENSATION CLAIMS.—In the case of a claim by a veteran for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination, or obtaining a medical opinion, when the evidence of record before the Secretary—

(1) establishes that—

(A) the claimant has—

(i) a current disability;

(ii) current symptoms of a disease that may not be characterized by symptoms for extended periods of time; or

(iii) persistent or recurrent symptoms of disability following discharge or release from active military, naval, or air service; and

(B) there was an event, injury, or disease (or combination of events, injuries, or diseases) during the claimant's active

military, naval, or air service capable of causing or aggravating the claimant's current disability or symptoms, but

(2) is insufficient to establish service-connection of the current disability or symptoms.

(e) REGULATIONS.—The Secretary shall prescribe regulations to carry out this section. Such regulations shall include provisions for—

(1) specifying the evidence necessary under subsection (a) to establish a claimant's eligibility for a benefit under a law administered by the Secretary; and

(2) determining under subsections (b) and (c) what records are relevant to a claim.

(f) RULE WITH RESPECT TO DISALLOWED CLAIMS.—Nothing in this section shall be construed to require the Secretary to reopen a claim that has been disallowed except when new and material evidence is presented or secured, as described in section 5108 of this title.

(g) OTHER ASSISTANCE NOT PRECLUDED.—Nothing in this section shall be construed as precluding the Secretary from providing such other assistance to a claimant as the Secretary considers appropriate.

* * * * * * *

§5106. Furnishing of information by other agencies

The head of any Federal department or agency shall provide such information to the Secretary as the Secretary may request for purposes of determining eligibility for or amount of benefits, or verifying other information with respect thereto. *No charge may be imposed by the head of any such department or agency for providing such information.*

[§5107. Burden of proof; benefit of the doubt

[(a) 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.

[(b) When, after consideration of all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden specified in subsection (a) of this section.**]**

§5107. Burden of proof; benefit of the doubt

(a) BURDEN OF PROOF.—Except when otherwise provided by this title or by the Secretary in accordance with the provisions of this

title, a claimant shall have the burden of proving entitlement to benefits.

(b) BENEFIT OF THE DOUBT.—The Secretary shall consider all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary and shall give the claimant the benefit of the doubt when there is an approximate balance of positive and negative evidence regarding any issue material to the determination of the matter.

* * * * * * *

§5126. Benefits not to be denied based on lack of mailing address

Benefits under laws administered by the Secretary may not be denied a claimant on the basis that the claimant does not have a mailing address.

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