

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

HEZEKIAH GREEN, JR.,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 16-740
)	
ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

APPELLANT’S RESPONSE TO JUNE 14, 2016, COURT ORDER

On June 14, 2016, the Court sought supplemental memoranda of law from both parties. It directed the parties to respond to four questions regarding sections 1.600 through 1.603 of title 38 and this Court’s jurisdiction over electronic records access. This memorandum responds to the Court’s order. In part I, Appellant’s counsel responds to the Court’s first three questions regarding sections 1.600 through 1.603. Part II addresses the Court’s fourth question regarding jurisdiction.

I. Sections 1.600 through 1.603 govern access to VBMS. Appellant is unaware of any other automated systems to which the regulations refer. VA Manual M21-1 provides for Court attorney access to a claimant’s electronic claims folder.

In order to administer benefits and provide healthcare, VA utilizes a number of computerized systems, such as the Veterans Appeals Control and Locator System (VACOLS), the Veteran Service Network (VETSNET), and e-Benefits. In the

Secretary's May 26, 2016, response, he asserted that sections 1.600 through 1.603 only applied to "inquiry commands of the Benefits Delivery Network [BDN]." Sec. Resp. at 5. However, in 1996, VA established VETSNET to *replace* the Benefits Delivery Network. *See* Audit of Veterans Service Network, VA Office of Inspector General, 09-03850-99 (February 18, 2011), at page 1. The Benefits Delivery Network was "the network system that track[ed] claims filed by veterans for benefits (for example, pensions, compensation, education, etc.). . . ." M26-12, Ch. 3, Section B. (July 19, 2007). As of 2008, VETSNET was the "core business application and payment system for compensation benefits." Audit, page 1. By 2013, VA had launched VBMS, a paperless claims processing system intended to improve benefits delivery and eliminate VA's backlog. VA Office of Public Affairs News Release, *National Deployment of Paperless Claims Processing System Underway*, January 14, 2013.

It is Appellant's counsel's understanding that many of VA's computerized programs contain overlapping information. For example, VACOLS contains information about pending appeals to the Board, while VBMS contains information about past and present claims, including pending appeals. However, VBMS "is *the electronic equivalent* of the VBA paper claims folder." *Hearing on 12/04/2012: Wading through Warehouses of Paper: The Challenges of Transitioning Veterans Records to Paperless Technology*, Witness Testimony of Alan Bozeman, Director of VBMS, <https://veterans.house.gov/witness-testimony/mr-alan-bozeman-0> (emphasis added). Moreover, the Secretary concedes, "VBMS is the *only* system through which a

claimant's e-folder is *reviewable*." Sec. May 26, 2016, Response, page 2, n. 2 (emphasis added).

Sections 1.600 through 1.603 specifically govern "read-only access to the automated Veterans Benefits Administration (VBA) *claims records*." 38 C.F.R. § 1.600. VA's use of the phrase "read-only access" indicates the regulation is intended to provide representatives the opportunity to review their clients' claims files. VBMS constitutes the Veteran's original claims file. *See* Sec. Response page 2, n. 2 ("The e-folder is the digitized version of what used to be the paper claims file."); Sec. Corrected Response, at 19, *Robinson v. McDonald*, U.S. Vet. App. No. 15-715, Appellee's Corrected Response to the Court's December 11, 2015, Order, at 19; *see also* Witness Testimony of Alan Bozeman, *supra*.

In response to the Court's second question, Appellant's counsel is unaware of any other system, other than VBMS records, which contains the data sought. Under the current Court procedures, Appellant's counsel receives a copy of the Record Before the Agency – a snapshot of the Veteran's claims file as it was on the day the Board issued the decision. Without remote access to VBMS, Appellant's counsel has no way of ensuring the completeness of that record. Where the Board decision raises the possibility of missing records, remote and real-time access is paramount. Here, the Board specifically referred to treatment notes received into VBMS in April 2015, but which it could not locate. R-5. The Board found the VBMS entry was "in error." *Id.* If Appellant's counsel had remote access to the Veteran's VBMS file, she could

easily verify the Board's finding. Without such access, she is dependent on that finding. This is precisely the type of situation contemplated by VA's regulations, which directs access "as part of the representation of the claimant." 38 C.F.R. § 1.601(a)(2).

In response to the Court's third question, Appellant's counsel maintains that sections 1.600 through 1.603 *do* pertain to VBMS. Counsel is unaware of any other regulations, policies, handbooks, or internal VA guidance specifically governing the procedure for granting Court attorneys read-only remote access to VBMS. However, the VA Manual M21-1 does contemplate "release [of] a claimant's claims folder to his/her attorney without a signed VA Form 21-22a being of record. . . ." VA Manual M21-1 Part I, Ch. 3, Section B, Topic 2.a.

M21-1, Part I, Ch. 3, Section B contains topics related to power of attorney rights to review claims records. Section B.1.a states "[VA's] policy is that all claimants have the right to representation *before the department*. . ." (emphasis added). Later topics in this section refer to POA access to Veteran's electronic claims folder. *See* VA Manual M21-1, I.3.B.1.e. Section 1.3.B.2.a specifies "Without a VA Form 21-22a signed by the claimant, an attorney does not have the authority to review the claims folder" However, an exception to this rule exists when the Office of General Counsel makes a request "regarding representation of claimants in litigation before the U.S. Court of Appeals for Veterans Claims" and the Veteran provides a "signed

statement from the claimant authorizing VA to provide a copy of his/her claims folder to the attorney representing the claimant.”

This subsection does not expressly discuss Court attorneys’ *remote access* to a veterans’ claims folder. However, VA has taken the position that a veteran’s VBMS file is the *original* file. See *Robinson v. McDonald*, Docket # 15-0715, Appellee’s Corrected Response to the Court’s December 11, 2015, Order, at 19. Thus, references to a veteran’s claims folder logically encompass electronic access to the veteran’s e-folder. Moreover, later topics in Section B provide guidance on a representative’s “access [to] VA electronic systems pertaining to the claimant where there is a valid claimant authorization in effect permitting disclosure of all protected records.” VA Manual M21-1, Part I, Ch. 3, Section B.2.g. Finally, Section B.2.j provides the location for conducting a claims folder review as “within an RO in a space designated for such reviews.” Alternatively, “[t]he RO director may permit accredited representatives of service organizations to review a claims folder at the desk of the *accredited* representative.” (emphasis added).

II. The Court has jurisdiction to order access to electronic records because these records constitute the original claims file. Under Rule 10(d), counsel for Appellant is entitled to inspect original material in the RBA.

Appellant has appealed a final Board decision to this Court, which has clear jurisdiction over that appeal. 38 U.S.C. § 7252(a), 7266. The Court’s jurisdictional statute provides, “Review in the Court shall be on the record of proceedings before the Secretary and the Board.” 38 U.S.C. § 7252(b). Effective judicial review “depends

on the quality and completeness of the record on appeal.” *King v. Brown*, 5 Vet.App. 19, 22 (1993). Indeed, the Court’s Rules of Practice and Procedure require the Secretary to produce, in addition to “all materials that were contained in the claims file on the date the Board issued the decision from which the appeal was taken,” “*any other material from the record before the Secretary and the Board.*” U.S. VET.APP. R. 10(a)(2) (emphasis added). This Court has full discretion to establish its local rules of practice for cases within its statutory grant of jurisdiction. *See Lefkowitz v. Derwinski*, 1 Vet.App. 439, 440 (1991) (Kramer, J. concurring) (“the Court has the power to provide for a rule that permits class actions” and to decline to make such a rule).

Rule 10(d) imposes a mandatory duty on the Secretary to “permit a party or a representative of a party to inspect and to copy, subject to reasonable regulation by the Secretary, any original material in the record before the agency.” U.S. VET. APP. R. 10(d). *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, (1998) (“[The mandatory ‘shall’. . . normally creates an obligation impervious to judicial discretion.” (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947))). The Court has jurisdiction to determine whether the Secretary’s regulations in this case allow for a reasonable opportunity to inspect and copy materials in the VBMS file. As Appellant previously argued, the Secretary has failed to demonstrate that his interpretation of the law meets that standard. *See* Apa. June 8, 2016, Reply, at 6.

The Court also has jurisdiction because Appellant’s counsel’s entitlement to remote access to his clients’ VA records is governed by laws affecting the provision of

benefits. *See Bates v. Nicholson*, 398 F.3d 1355, 1357 (2005); *Cox v. West*, 149 F.3d 1360, 1365 (Fed. Cir. 1998). This Court has jurisdiction to decide all cases involving 38 U.S.C. § 5904 because it is “a law that affects the provision of benefits by the Secretary to veterans.” *Cox*, 149 F.3d at 1365, *quoting from* 38 U.S.C. § 511(a). This jurisdiction includes cases involving 38 U.S.C. § 5904(a)(2) because “section 511’s reference to a ‘law’ is to a single statutory enactment that bears a Public Law number in the Statutes at Large.” *Bates*, 398 F.3d at 1362, *cited and relied on in Freeman v. Shinseki*, 24 Vet.App. 404, 413 (2011). Indeed, “any law that affects the provision of benefits is contemplated by section 511(a), even in the face of the Secretary’s argument that a matter is committed to his discretion.” *Freeman*, 24 Vet.App. at 414. This is consistent with the Supreme Court’s jurisprudence, which “has made clear that, unless Congress *explicitly* prohibits it, there is a strong presumption in favor of judicial review.” *Id.* at 415 (emphasis in original). The Court’s jurisdiction over matters involving § 5904 extends to matters under that statute’s implementing regulations. *See Bates*, 398 F.3d at 1357 (implicating accreditation of attorneys under 38 C.F.R. § 14.629).

The Secretary asserts it is not the Court’s role to “dictate to the Secretary how most effectively to administer the VA benefits system to ensure timeliness and fairness.” Sec. May 26, 2016, response at 8. While the Secretary may certainly establish guidelines for determining access to for representatives before the agency, providing remote access for Court attorneys is not a method by which the VA *administers benefits*. Proceedings before the Court, unlike before the VA, are adversarial.

See Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 306 (1985); *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). Providing remote access to a Court attorney is a method of ensuring appellants effective representation because representatives are entitled to meaningful access to claimant files. *See Expanded Remote Access to Computerized Veterans Claims Records by Accredited Representatives*, 59 FR 47082-02 (September 14, 1994). Meaningful access to the record of proceedings is necessary for judicial review. *See Robinson v. McDonald*, ___ Vet. App ___, ___, No. 15-715, slip. op. at 8 (Vet. App. July 14, 2016) (recognizing “the importance of review on an accurate record.”).

Furthermore, as counsel argued in the June 6, 2016, reply, this Court is an independent entity from VA and thus, is not bound by the Secretary’s rules or procedures. While the Secretary may dictate the manner in which a claimant’s representative practices before the agency, he has no such discretion to dictate this Court’s procedures. *Cf. Werden v. West*, 13 Vet.App. 463 (2000). In *Werden*, the regulation expressly granted discretion to the Secretary to “decide upon a method of disbursement *which in the Secretary’s opinion* is appropriate and advisable in the interest of the veteran and the Government and disburse the benefit payable according.” 38 C.F.R. § 36.4406 (emphasis added). However, the Secretary’s discretion does not insulate his actions from judicial review if the matter involves a law affecting veteran’s benefits. *Freeman*, 24 Vet.App. at 414. Here, the regulations at issue – sections 1.600 through 1.603 – do not grant the Secretary unfettered discretion to dictate how the

Court performs its judicial review, nor do the regulations allow the Secretary complete discretion over how to provide access to Appellant's records.

Respectfully submitted,
Hezekiah Green, Jr.,
By His Attorneys,
/s/ Jenna E. Zellmer

Jenna E. Zellmer
Chisholm Chisholm & Kilpatrick
One Turks Head Place, Suite 1100
Providence, RI 02903
(401) 331-6300