

In The
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Douglas J. Rosinski,)	
Petitioner,)	No. 18-678
)	
v.)	SOLZE NOTICE OF
)	RELEVANT INFORMATION
Robert L. Wilkie,)	
Secretary of Veterans Affairs,)	
<u>Appellee.</u>)	

Pursuant to *Solze v. Shinseki*, 26 Vet. App. 299, 301 (2013),

Petitioner informs the Court of a proposal in the Secretary's rulemaking for the "VA Claims and Appeals Modernization," 83 Fed. Reg. 39,818 (Aug. 10, 2018), potentially relevant to the Court's consideration of the issues in this case.¹

Prior notification of adverse action. VA shall give the veteran a period of at least 30 days to review, prior to its promulgation, an adverse action other than one which arises as a consequence of a change in training time or other such alteration in circumstances. During that period, the veteran shall be given the opportunity to:

- (1) Meet informally with a representative of VA;
- (2) Review the basis for VA decision, including any relevant written documents or material; and
- (3) Submit to VA any material which he or she may have relevant to the decision.

83 Fed. Reg. 39,818, 39,868 (Aug. 10, 2018) (proposed 38 § 21.420(d)).

¹ Petitioner first became aware of this section on September 4, 2018, during review of the 52-page Federal Register publication.

This proposed rule is relevant because it was filed *almost two weeks before oral argument* and directly challenges the Secretary's representations to the Court that allowing a few hundred attorneys to have access to pre-promulgation decisions would present essentially insurmountable administrative problems and would have the further adverse impact of opening the process to individual veterans. Contrary to this position, the Secretary's proposal would:

- (1) Require the Secretary to provide pre-promulgation access to *hundreds of thousands* of individuals;
- (2) Provide not only opportunity to review the proposed decision document, but have a *face-to-face meeting* with a VA employee;
- (3) Not only allow discussion of the issues, but allow the *submission of any material* "relevant to the decision" after the review; and
- (4) *Promote* the review from an administrative "policy" in the M21-1MR to a formal regulation with the *force of law*.

The scope of the proposed rule, therefore, far exceeds correcting the "Narrative" section of a decision, O.A. at 42:40-43:59, 44:50-45:07, or merely allowing attorneys to participate in the existing VSO pre-

promulgation review process.² And, it certainly explicitly contradicts the Secretary's expressed "logistical and legal concerns" with opening the process to attorneys and individual veterans. *Contra* O.A. at 49:57-51:03, 1:09:20-1:11:02; 1:04:56-1:05:00.

WHEREFORE, Petitioner provides the Court with information potentially relevant to resolution of this matter.

Respectfully submitted,

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² That said, Petitioner has assumed – perhaps naively – that the Secretary has implicitly included attorneys and other representatives within the scope of the term “veteran” as used in the proposed rule and so will allow attorneys to represent their clients for purposes of the pre-promulgation review. The Court, however, may benefit from obtaining the position of the Secretary on whether attorneys (and, for that matter, VSOs) are included within the scope of this rule to avoid future litigation over the issue.

depending on whether the prior decision is finally adjudicated.

(c) *Notice requirements.* Notice of a decision made under paragraph (b)(1) or (3) of this section will include all of the elements described in § 21.420(b).

(Authority: 38 U.S.C. 5104B, 5108, 5109A, and 7105)

■ 180. Amend § 21.420 by:

- a. Revising paragraphs (b) and (d).
- c. Adding new paragraph (e).
- d. Revising the authority citation to read as follows:

§ 21.420 Informing the veteran.

(a) * * *

(b) *Notification.* Each notification should include the following:

- (1) Identification of the issues adjudicated.
- (2) A summary of the evidence considered by the Secretary.
- (3) A summary of the applicable laws and regulations relevant to the decision.
- (4) Identification of findings favorable to the veteran.
- (5) In the case of a denial of a claim, identification of elements not satisfied leading to the denial.
- (6) An explanation of how to obtain or access evidence used in making the decision.
- (7) A summary of the applicable review options available for the veteran to seek further review of the decision.

* * * * *

(d) *Prior notification of adverse action.* VA shall give the veteran a period of at least 30 days to review, prior to its promulgation, an adverse action other than one which arises as a consequence of a change in training time or other such alteration in circumstances. During that period, the veteran shall be given the opportunity to:

- (1) Meet informally with a representative of VA;
- (2) Review the basis for VA decision, including any relevant written documents or material; and
- (3) Submit to VA any material which he or she may have relevant to the decision.

(e) *Favorable findings.* Any finding favorable to the veteran is binding on all subsequent VA and Board of Veterans' Appeals adjudicators, unless rebutted by clear and convincing evidence to the contrary.

(Authority: 38 U.S.C. 3102, 5104, 5104A, and 7105)

- 181. Amend § 21.430(b) by removing the text "21.98" and adding in its place the text "21.96".

Subpart B—Claims and Applications for Educational Assistance

■ 182. The authority citation for part 21, subpart B is revised to read as follows:

Authority: 38 U.S.C. 501(a).

§ 21.1033 [Amended]

- 183. Amend § 21.1033(f)(2) by removing the text "§§ 20.302 and 20.305" and adding in its place the text "§§ 20.203 and 20.110".
- 184. Revise § 21.1034 to read as follows:

§ 21.1034 Review of decisions.

(a) *Decisions.* A claimant may request a review of a decision on eligibility or entitlement to educational assistance under title 38, United States Code. A claimant may request review of a decision on entitlement to educational assistance under 10 U.S.C. 510, and 10 U.S.C. chapters 106a, 1606, and 1607. A claimant may not request review of a decision on eligibility under 10 U.S.C. 510, and 10 U.S.C. chapters 106a, 1606, and 1607 or for supplemental or increased educational assistance under 10 U.S.C. 16131(i) or 38 U.S.C. 3015(d), 3021, or 3316 to VA as the Department of Defense solely determines eligibility to supplemental and increased educational assistance under these sections.

(b) *Reviews available.* Except as provided in paragraph (d) of this section, within one year from the date on which the agency of original jurisdiction issues notice of a decision described in paragraph (a) of this section as subject to a request for review, a claimant may elect one of the following administrative review options:

- (1) *Supplemental Claim Review.* See § 3.2501 of this chapter.
- (2) *Higher-level Review.* See § 3.2601 of this chapter.
- (3) *Board of Veterans' Appeals Review.* See 38 CFR part 20.

(c) *Part 3 provisions.* See § 3.2500(b)–(d) of this chapter for principles that generally apply to a veteran's election of review of a decision described in paragraph (a) of this section as subject to a request for review.

(d) *Contested claims.* See subpart E of part 20 of this title for the timeline pertaining to contested claims.

(e) *Applicability.* This section applies where notice of a decision described in paragraph (a) of this section was provided to a veteran on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, or where a veteran has elected review of a legacy claim under the modernized review system as provided in § 3.2400(c) of this chapter.

(Authority: 38 U.S.C. 501, 5104B)

- 185. Add § 21.1035 to read as follows:

§ 21.1035 Legacy review of benefit claims decisions.

(a) A claimant who has filed a Notice of Disagreement with a decision described in § 21.1034(a) that does not meet the criteria of § 21.1034(e) of this chapter has a right to a review under this section. The review will be conducted by the Educational Officer of the Regional Processing Office, at VA's discretion. An individual who did not participate in the decision being reviewed will conduct this review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. Review under this section will encompass only decisions with which the claimant has expressed disagreement in the Notice of Disagreement. The reviewer will consider all evidence of record and applicable law, and will give no deference to the decision being reviewed.

(b) Unless the claimant has requested review under this section with his or her Notice of Disagreement, VA will, upon receipt of the Notice of Disagreement, notify the claimant in writing of his or her right to a review under this section. To obtain such a review, the claimant must request it not later than 60 days after the date VA mails the notice. This 60-day time limit may not be extended. If the claimant fails to request review under this section not later than 60 days after the date VA mails the notice, VA will proceed with the legacy appeal process by issuing a Statement of the Case. A claimant may not have more than one review under this section of the same decision.

(c) The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under the version of § 3.103(c) of this chapter predating Public Law 115–55.

(d) A review decision made under this section will include a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.

(e) The reviewer may grant a benefit sought in the claim, notwithstanding § 3.105(b) of this chapter. The reviewer may not revise the decision in a manner that is less advantageous to the claimant