

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

**JEREMY BEAUDETTE AND
MAYA BEAUDETTE,**
individually and on behalf of others
similarly situated,

Petitioners,

v.

DENIS MCDONOUGH,
in his capacity as
Secretary of Veterans Affairs,

Respondent.

Vet. App. No. 20-4961

JOINT RESPONSE TO APRIL 19, 2021 ORDER: JOINT CLASS NOTICE PLAN

Petitioners Jeremy and Maya Beaudette (Petitioners) and Respondent Secretary of Veterans Affairs (Secretary) (collective, the Parties) jointly request the Court’s approval of the Parties’ Joint Notice Plan, attached hereto as Exhibit A, which is designed to provide notice to claimants of their right to appeal to the Board of Veterans’ Appeals (Board) benefits decisions under the Program of Comprehensive Assistance for Family Caregivers (Caregiver Program).

On April 19, 2021, the Court issued its Order granting Petitioners’ petition and motion for class certification. The Court’s Order, among other things: (1) held that Caregiver Program claimants are entitled to seek review at the Board; (2) ordered the Secretary to allow Petitioners to appeal their Caregiver Program claim to the Board; (3) enjoined the Secretary from denying Board review of future benefits decisions under the Caregiver Program; and (4) certified a class of “claimants who received an adverse

benefits decision under the Caregiver Program, exhausted the administrative review process within the VHA, and have not been afforded the right to appeal to the [Board].” *See* 2021 WL 1526226, at *9.

As to class notice, upon finding that “VA has had a widespread practice of informing veterans, by mail, that Caregiver Program benefits decisions may not be appealed to the Board,” the Court concluded the Secretary should “send members of the proposed class an updated benefits decision notice.” *See* 2021 WL 1526226, at *8–9. The Parties have conferred at length on these issues, resulting in the enclosed Joint Notice Plan, attached hereto as Exhibit A, which includes the Proposed Notice attached thereto. Below, the Parties provide an explanation for some of the material provisions of the Joint Notice Plan and Proposed Notice and the reasons for including them. The Joint Notice Plan is largely agreed to, with the exception of issues, where noted, VA needs more time to consider their feasibility and/or the parties disagree.

Identification of the Class and Collection of Written Decision Records

The primary impediment the Parties have encountered is identifying the members of the certified class. This is primarily due to VA’s past information technology (IT) and data collection issues regarding the Caregiver Program, as noted in a recent audit conducted by the VA Office of Inspector General.¹ The Secretary maintains that IT and

¹ *See generally* VA Office of Inspector General, Office of Audits and Evaluations, Veterans Health Administration, *Program of Comprehensive Assistance for Family Caregivers: IT System Development Challenges Affect Expansion* (Report Number 20-00178-24, June 8, 2021) (available at <https://www.oversight.gov/sites/default/files/oig-reports/VA/VAOIG-20-00178-24.pdf>). *See also* United States Government Accountability Office, *VA Health Care Actions Needed to Improve Family Caregiver*

data limitations prior to October 1, 2020 hinder VA’s ability to identify members of the class. In particular, the Secretary maintains that VA cannot reasonably determine which claimants have “exhausted the administrative review process within the VHA” because, before October 1, 2020, VA lacked standardized requirements for tracking and documenting Caregiver Program appeals. Based on the available data, however, VA can identify all claimants who received a Caregiver Program decision since the Caregiver Program commenced in May 2011, including “claimants who received an adverse benefits decision under the Caregiver Program.” Additionally, because it was not VA’s practice to provide appeal rights to the Board with Caregiver Program decisions, all such individuals “have not been afforded the right to appeal to the [Board].”

In view of the IT and data limitations, the Parties have agreed it is important to be over-inclusive to effect the ultimate ends of the Court’s Order. Therefore, the parties agree that the Proposed Notice—and thus, Board appeal rights—should be given to this broader group of claimants (*i.e.*, those who received a decision under the Caregiver Program) despite the fact that only an unknown subset of those claimants have received an adverse decision and actually “exhausted” the VHA appeals process. To be clear, the Parties agree that any decision under the Caregiver Program will be treated as appealable to the Board, regardless of whether the claimant has initiated or obtained a higher level

Program (GAO-19-618, September 2019) (available at <https://www.gao.gov/assets/gao-19-618.pdf>), and United States Government Accountability Office, *VA Health Care Actions Needed to Address Higher-Than Expected Demand for the Family Caregiver Program* (GAO-14-675, September 2014) (available at <https://www.gao.gov/assets/gao-14-675.pdf>).

decision within the VHA clinical appeals process.² (As described in the Joint Notice Plan, the Parties dispute the impact of broadening the scope of notice recipients and whether those individuals should be deemed members of the certified class or whether the class definition would have to be amended to achieve such a result.)

In view of the IT and data limitations described above, the Parties also grappled with the issue of ensuring each claimant is given both (1) a notice of Board appeal rights and (2) a copy of the decision for which Board appeal rights are available. As a practical matter, and because the law requires it, the notice of Board appeal rights and the underlying benefits decision are typically sent together. *See* 38 U.S.C. § 5104(a), (b).

This case, however, presents the unusual circumstances in which written decisions were sent to claimants over the course of several years, but without notice of the corresponding right to appeal to the Board. The Parties recognized that it is likely a significant portion of the claimants have not maintained their records, nor can they recall the details of the underlying decisions (*e.g.*, dates, findings, etc.), such that (1) simply giving them a generic notice of Board appeal rights for some unidentified Caregiver Program decision, and without specifying the date and nature of the decision, could create frustration and confusion, and (2) as a practical matter, claimants *need* the underlying details to prepare the required Notice of Disagreement. In the case of VA Form No. 10182, for example, claimants are asked to list the date of the decision and the specific issues of disagreement.

² The Secretary notes his view that the right to appeal Caregiver Program decisions to the Board is contingent on there being no changes to the controlling law governing the Caregiver Program or Board jurisdiction, and otherwise as long as the Court's April 19, 2021, decision remains in effect.

The Parties have agreed to ensure claimants can quickly and efficiently obtain their Caregiver Program decisions and the dates thereof directly from VA through a streamlined procedure. Specifically, the Proposed Notice will identify a process, including a specific form and mailing address, for claimants to request their Caregiver Program decisions from VA in writing. The Parties have agreed that the Secretary will request expedited approval from the Office of Management and Budget (OMB) of a new form that will be made available for requesting decisions and/or information relating to past Caregiver Program decisions. VA believes the creation and approval process for this new form will take approximately six to eight weeks. VA agrees it will share the contents of the proposed form with Class Counsel prior to seeking approval.

AMA versus Legacy Appeals Process

The Parties also recognized that the class includes individuals who received Caregiver Program benefits decisions issued both before and after the effective date for the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), which is February 19, 2019. Benefits decisions made before the AMA effective date follow the “Legacy” appeals process, which requires submission of a Notice of Disagreement to VHA, which prompts VHA to prepare a Statement of the Case. On the other hand, benefits decisions made on or after the AMA effective date follow the AMA appeals process, which requires submission of a specific Notice of Disagreement form (VA Form No. 10182) to the Board and for which VA does not issue a Statement of the Case.

Because the Secretary has indicated that the Legacy process Notice of Disagreement form is no longer an OMB-approved Information Collection, the Parties

have agreed that the Secretary will request expedited OMB approval of a new form that will be made available for claimants with decisions dated prior to February 19, 2019, to initiate appeals in the Legacy system.

As described in the Joint Notice Plan, Petitioners and VA dispute whether the new Notice of Disagreement form should also be created and approved such that it can cover Legacy and AMA claims, and therefore would obviate the need to refer to two Notice of Disagreement forms in the Proposed Notice. Though willing to evaluate the question, VA has not yet reviewed this proposal and the Secretary cannot yet comment on whether this would be appropriate or feasible and so cannot commit to this proposal.

Respectfully submitted,

Date: August 5, 2021

FOR PETITIONERS AND THE CLASS:

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EXHIBIT A

JOINT NOTICE PLAN

Petitioners Jeremy and Maya Beaudette, Class Counsel, and Respondent Secretary of Veterans Affairs (Secretary or VA) (collective, the Parties) have agreed to the following Joint Notice Plan, except where noted.

1. VA will identify all claimants, inclusive of veterans and caregivers, who received one or more decisions under the Program of Comprehensive Assistance for Family Caregivers (Caregiver Program) on or after May 2011 through the date Caregiver Program decision notices include appeal rights to the Board or the date the Court approves this Joint Notice Plan, whichever is later.¹
2. The Parties agree, based on the Court's April 19, 2021 decision, that claimants may already appeal Caregiver Program decisions to the Board through the appeals process applicable to the date of their decision, regardless of when or whether they receive a copy of the Proposed Notice.
3. The Parties agree that any decision under the Caregiver Program is appealable to the Board of Veterans' Appeals (Board), regardless of whether the claimant has initiated or obtained a higher level decision within the VHA clinical appeals process.
 - a. **Petitioners/Class Counsel's Position:** While VA takes the position that claimants who did not "exhaust" the VHA clinical appeals process are entitled to Board appeal rights and will receive class notice described herein, VA also takes the position that these individuals are not members of the class. Due to VA's difficulties in identifying those who "exhausted" the VHA clinical appeals process (caused by its own record and data-retention deficiencies), all claimants with Caregiver Program decisions should be deemed to have exhausted the VHA appeal process and thus should be considered members of the certified class. Alternatively, should the Court determine that a formal motion to amend the class definition must be filed to achieve this end, Petitioners are open to filing such a motion.
 - b. **VA's Position:** Class Counsel suggests that all claimants with Caregiver Program decisions should be "deemed to have exhausted the VHA appeal process and thus should be considered members of the certified class." Alternatively, the Secretary notes that a claimant need not have exhausted

¹ During the Parties' meet-and-confer efforts culminating in this Joint Notice Plan, Petitioners learned that VA has not yet begun providing Board appeal notices to claimants whose decisions issued after the Court's April 19, 2021 order. Petitioners object to VA's delay, and nothing in this Joint Notice Plan shall be construed as a waiver of enforcement of the Court's order.

the VHA appeal process to have the right to appeal to the Board pursuant to the Court's decision. Further, insofar as Class Counsel's language may be read as a request for an amendment of the class, the Secretary suggests that a jointly proposed notice plan is not the appropriate method to request such an amendment, rather Petitioners should file a formal motion.

Finally, on a separate note, the Secretary notes his view that the provisions of this plan and the right to appeal Caregiver Program decisions to the Board are contingent on there being no changes to the controlling law governing the Caregiver Program or Board jurisdiction, and otherwise as long as the Court's April 19, 2021, decision remains in effect.

4. Timing for Implementation of the Joint Notice Plan.

- a. **Petitioners/Class Counsel's Position:** Within 90 days after the Court's approval of this Joint Notice Plan, (1) the Parties will finalize the remaining details of the **Proposed Notice** attached hereto and enclosures, and (2) VA will begin sending to claimants described in paragraph 1 a copy of the **Proposed Notice**.
- b. **VA's Position:** Within 90 days after the Court's approval of this Joint Notice Plan, VA will provide the Court and class counsel an update on its implementation plan and estimated timeline to (1) finalize the remaining details of the **Proposed Notice** attached hereto and enclosures, and (2) begin sending to claimants described in paragraph 1 a copy of the **Proposed Notice**.

5. AMA versus Legacy Appeals Process:

- a. **Petitioners/Class Counsel's Position:** VA has agreed to obtain expeditious approval of a new VA appeals form after consultation with Class Counsel on its substance. VA, however, proposes that this new form would be applicable only to a Caregiver Program Legacy claim and proposes to refer all claimants to two appeals forms: the existing AMA Notice of Disagreement form and the to-be-developed Caregiver Program Legacy appeals form. Using two appeals forms is likely to cause confusion and is unnecessary because the to-be-developed Caregiver Program appeals form can be created to apply to both AMA and Legacy appeals processes. Moreover, VA has informed Petitioners that if the claimant uses the wrong appeals form, VA will not accept it, thereby causing delay, further confusion, and possible prejudice to claimants while VA communicates with the claimant about the need to complete a different appeals form. Therefore, Petitioners propose, and believe there is no valid authority that prevents the Court from approving, a notice plan requiring the parties to seek expeditious approval of one Caregiver Program Notice of Disagreement form which, when properly completed, will allow VA to (a) identify each

decision being appealed, (b) determine which appeals are subject to the Legacy system and which are subject to the AMA and (c) prepare a Statement of the Case for those appeals, if any, that are subject to the Legacy system.

If the Court rejects our single-form proposal and approves VA's proposal, which includes using two appeals forms, Petitioners request that the Court order that no claimant will be prejudiced by submitting the incorrect Notice of Disagreement form.

- b. **VA's Position:** Because this category of claimants includes individuals who received decisions governed by the Legacy and AMA appeals process, the Proposed Notice suggested by the Secretary will include information on how to submit a Notice of Disagreement under both appeals processes, to allow the claimant to submit the correct form depending on the claimant's decision date.

The prior Legacy process Notice of Disagreement form (VA Form 21-0958) is no longer an Office of Management and Budget (OMB)-approved Information Collection. While a claimant could submit an NOD under the Legacy process without a form based on written instructions in the Proposed Notice, the Secretary believes it would be beneficial to claimants and to the agency to create a new form, on an emergency basis, for use by claimants seeking to appeal Caregiver Program decisions in the Legacy process. Accordingly, the Secretary's proposed plan involves a Proposed Notice that informs Legacy claimants of this yet-to-be created new form for NODs under the Legacy process and provides a link to where that form may be located on the internet, provides an internet link to the current AMA NOD, and explains the circumstances under which the a claimant should use either form.

Class Counsel proposes an alternative in which VA seeks emergency approval of a single form that serves both as a Legacy NOD and an AMA NOD. This proposal has not yet been reviewed by the agency and the Secretary cannot yet comment on whether this would be appropriate or feasible. The Secretary will consider this question and inform Class Counsel if this option is found to be so. At this stage, the Secretary asserts that his proposal – creating a new NOD form for Legacy appeals where no such form is currently approved for use, while continuing use of the AMA NOD for AMA claimants -- addresses the needs for claimants with appeals that appropriately belong in the separate appeal systems based on the date of their Caregiver Program decision and asks the Court to approve that plan.

- 6. VA will complete sending the notices described above with reasonable diligence and will devote appropriate staffing and resources to achieve those ends.

7. Because of the likelihood that claimants do not currently possess their past written Caregiver Program decisions and the likelihood that claimants will not be able to recall all the details necessary to prepare the Notices of Disagreement (*e.g.*, the decision dates or specific findings), VA agrees to designate a process, including a specific form and VA mailing address, for claimants to request their past Caregiver Program decisions and the dates of such decisions. The attached **Proposed Notice** will identify the appropriate process for claimants to initiate such requests. VA agrees it will search for decisions requested through the designated process to the best of its ability, and in any event, will respond to the claimant within 180 days of the request by providing the Caregiver Program decision or by briefly explaining the efforts VA made to locate the Caregiver Program decision. If, after performing a reasonable search and inquiry, VA is unable to locate a copy of the written Caregiver Program decision, VA agrees that it will provide to the claimant the details necessary for the claimant to complete the appropriate Notice of Disagreement form.
8. In an effort to achieve fair transparency and to ensure Class Counsel and VA are able to perform their functions, the Parties agree to do the following:
 - a. VA will provide a written status update by email to Class Counsel every 90 days after VA begins sending the notices to claimants. The process for processing appeals of Caregiver Program decisions and requests for information about past Caregiver Program decisions is still being developed by VA. Accordingly, VA is still considering what information it will be able to report to Class Counsel. While the precise nature of the reports is not yet known, the Parties agree to reach agreement on the nature of those reports.
 - b. The Parties will engage in a conference call no less than every 30 days to address any issues that may arise during the class proceedings. (The Parties may, from time to time, by agreement, revise the requirements of this paragraph, including reducing the frequency of the conference calls or discontinuing them altogether, depending on the circumstances and evolution of the class proceedings, without leave from the Court.)
 - c. In addition to the periodic correspondence described above, VA and Class Counsel each agree to continue to work together in good faith and to respond to inquiries from the other party that may come up during the class proceedings, for example, any claimant-specific issues that have been brought to the attention of either party relating to the class procedure described herein.
9. This Joint Notice Plan, except as noted herein, can only be amended with the Court's approval. If a Party seeks amendment, the Parties should first attempt to

resolve their dispute informally and, upon agreement, jointly seek the Court's approval for any amendment. If the Parties are unable to resolve their differences, the Parties will submit a joint statement to the Court setting forth the Parties dispute and their respective positions.

Proposed Notice

[Date]

RETURN ADDRESS
RETURN ADDRESS
RETURN ADDRESS

NAME
ADDRESS
CITY STATE ZIP

Dear _____,

If you received a decision under the VA Program of Comprehensive Assistance for Family Caregivers (Caregiver Program) that you disagree with, you can appeal to the Board of Veterans' Appeals.

You are receiving this letter because VA's records show that you received one or more decisions from VA concerning the Caregiver Program. As the result of a class-action lawsuit, *Beaudette v. McDonough*, the U.S. Court of Appeals for Veterans Claims recently ordered that anyone who has ever received a decision under the Caregiver Program can now appeal that decision to the Board of Veterans' Appeals (Board). Before the Court's order, Caregiver Program decisions were appealable only through the Veterans Health Administration clinical process.

These letters are being issued in phases, so everyone who received one or more decisions from VA concerning the Caregiver Program will not receive this notice at the same time.

This letter explains how you can appeal a Caregiver Program decision to the Board. It does not matter how long ago you received a Caregiver Program decision. You are still allowed to appeal that decision to the Board. If you are successful in your Board appeal, you may be eligible for reinstatement of benefits and/or back-pay of monetary stipend benefits.

How to Appeal to the Board

[As set forth in paragraph 5 of the Joint Notice Plan, the Parties have not agreed on whether there will be one or two Notice of Disagreement forms, which affects this section of the Proposed Notice. Each Party's proposal is set forth in the Attachment 1 below.]

Get More Information About Your Caregiver Program Decisions

If you would like to appeal but do not have enough information to fill out the Notice of Disagreement form, you can ask VA for your Caregiver Program decisions. You can do this by filling out a request on VA Form [TBD]. The Information and Detailed Instructions on that form explain what information you need and where to send the form. A copy of VA Form [TBD] is enclosed. If you need information about the Caregiver Program decisions in your case, we encourage you to complete and send the form to VA within a year of the date of this letter.

Please keep a copy of any written request for information for your records. If you request a copy of the Caregiver Program decision and VA cannot find it, we will try to give you the information needed to file an appeal.

If you have any questions about your appeal rights, please call the *Beaudette* Class Counsel at [phone number]. Class Counsel represent the class in the *Beaudette* lawsuit, but does not represent you in your individual Caregiver Program claim or appeal. [The parties are still determining whether it is feasible for VA to also provide a phone number for questions about this notice].

You can also receive help with your individual claim or appeal from a Veterans Service Organization representative, an attorney, or agent accredited by VA. For a list of VA-recognized organizations and VA-accredited individuals that are authorized to help with VA benefit claims, visit <https://www.va.gov/ogc/apps/accreditation/index.asp>.

Apply or Reapply for Caregiver Program

If you are not currently participating in the Caregiver Program and would like to be, VA encourages you to reapply. On October 1, 2020, regulatory changes went into effect that could impact your eligibility. Individuals who wish to be considered for designation by VA as Primary or Secondary Family Caregivers must submit a joint application, along with the Veteran or Service member. You are allowed to reapply for Caregiver Program benefits and also appeal your past Caregiver Program decisions to the Board at the same time.

For more information on how to apply or reapply for the Caregiver Program, visit <https://www.caregiver.va.gov/>. Individuals may also call the Caregiver Support Line at 855-260-3274 for more information or assistance with the application.

[Signature Block TBD]

Attachment 1

Petitioners/Class Counsel Proposal:

How to Appeal to the Board

If you disagree with one or more VA decisions under the Caregiver Program, you can now appeal directly to the Board. To appeal, you need to know the specific issue or issues you would like to appeal. You also need to know the date of the decision. You can appeal more than one decision, but you need to identify the date and specific issues of each decision you are appealing.

Please read these instructions carefully.

To appeal one or more Caregiver Program decisions, you must complete and submit the enclosed VA form entitled Caregiver Program Notice of Disagreement. You can also access the form at [URL to be inserted]. The form explains what information you need and where to send the form.

The date of each Caregiver Program decision you are appealing controls how VA and the Board will process your appeal.

If you appeal a Caregiver Program decision dated **before** February 19, 2019, VA will send you a Statement of the Case. The Statement of the Case will summarize the reasons for the Caregiver Program decision you are appealing. The Statement of the Case will also provide further information for how to continue your appeal to the Board.

If you appeal a Caregiver Program decision dated **on or after** February 19, 2019, your appeal will go directly to the Board. The Board will process your appeal according to the Board Review Option you select on the Caregiver Program Notice of Disagreement form.

VA's Proposal:

How to Appeal to the Board

If you disagree with a VA decision under the Caregiver Program, you can now appeal directly to the Board. To appeal, you need to know the specific issue or issues that you would like to appeal. You also need to know the date of the decision. You can appeal more than one decision, but you need to identify each decision you are appealing.

Instructions for how to appeal depend on when VA made its decision. Please read these instructions carefully.

For a Caregiver Program decision dated on or after February 19, 2019: You can appeal to the Board by filling out VA Form 10182 - Decision Review Request: Board Appeal (Notice of Disagreement) and sending it directly to the Board. The Information and Detailed Instructions on that form explain what information you need and where to send the form. You can access it at <https://www.va.gov/vaforms/va/pdf/VA10182.pdf>.

For a Caregiver Program decision dated before February 19, 2019: You can appeal to the Board by filling out VA Form [TBD], and sending it to [TBD]. The Information and Detailed Instructions on that form explain what information you need and where to send the form. You can access it at [TBD website]. After you submit the form, but before the Board considers your appeal, VA will send you a Statement of the Case summarizing the reasons for the Caregiver Program decision you are appealing. The Statement of the Case will provide further information for how to continue your appeal to the Board.

Please make sure to use the correct form based on the date of the decision you are appealing and send the form to the address indicated on that form.