

**Department of  
Veterans Affairs**

# Memorandum

Date: June 23, 2004 VAOPGCPREC 5-2004

From: General Counsel (022)

Subj: Applicability of 38 U.S.C. §§ 5103(a) and 5103A to Claims that Cannot Be Substantiated

To: Acting Director, Compensation and Pension Service (21)

QUESTIONS PRESENTED:

A. Does 38 U.S.C. § 5103(a) require the Department of Veterans Affairs (VA) to provide notice of any information and evidence necessary to substantiate a claim where the claim cannot be substantiated under the law or based on the application of the law to undisputed facts?

B. Does 38 U.S.C. § 5103A require VA to assist a claimant in obtaining evidence where the claim cannot be substantiated under the law or based on the application of the law to undisputed facts?

DISCUSSION:

Introduction.

1. The Compensation and Pension Service has asked whether the reasoning behind our holding in VAOPGCPREC 2-2004 that notice pursuant to the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, of the information and evidence necessary to substantiate a claim for separate disability ratings for service-connected tinnitus in each ear may be applicable to certain other types of claims and to VA's duty to assist in claim development under the VCAA. In this opinion, we conclude that compliance with the "notice" and "duty to assist" provisions of the VCAA is not required where a claim cannot be substantiated by additional evidence.

2. Section 5103(a) of title 38, United States Code, states:

Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As

part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and

which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

Section 5103A of title 38, United States Code, titled, "Duty to assist claimants," details the type and manner of assistance VA must provide to claimants. See 38 U.S.C. § 5103A(a)(1), (b), (c), and (d). The applicability of the duty to assist is addressed in subsection (a), which states in pertinent part:

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

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

38 U.S.C. § 5103A(a).

3. Although the United States Court of Appeals for Veterans Claims (CAVC) has remanded many claims on the basis that VA failed to comply with the notice or duty-to-assist provisions of the VCAA, no CAVC opinion has ever held that notice and assistance under the VCAA must be provided in every claim. In fact, in cases decided soon after the enactment of the VCAA, the CAVC specifically recognized that "[w]hen there is extensive factual development in a case, reflected both in the record on appeal and the [Board]'s decision, which indicates no reasonable possibility that any further assistance would aid the appellant in substantiating his claim, . . . the VCAA does not apply." Wensch v. Principi, 15 Vet. App. 362, 368 (2001) (following Dela Cruz v. Principi, 15 Vet. App. 143, 149 (2001)); see also Long v. Principi, 17 Vet. App. 555 (2004) (where underlying claim was moot, CAVC did not grant appellant's request for remand pursuant to "the notice and assistance provisions of the [VCAA]"); Mason v. Principi, 16 Vet. App. 129, 132 (2002) (VCAA not applicable because statute, not evidence, was dispositive); Smith v. Gober, 14 Vet. App. 227, 231-32 (2000) (VCAA does not affect cases where issue on appeal is solely one of statutory interpretation), aff'd, 281 F.3d 1384 (Fed. Cir.), cert. denied, 537 U.S. 821 (2002). Against this backdrop, we will address, in turn, the notice and duty-to-assist provisions of the VCAA in the context of the questions presented above.

VCAA Notice Provision (38 U.S.C. § 5103(a)).

4. A recent VA General Counsel precedent opinion held that VA “is not required to provide notice of the information and evidence necessary to substantiate a claim for separate disability ratings for each ear for bilateral service-connected tinnitus because there is no information or evidence that could substantiate the claim, as entitlement to separate ratings is barred by current Diagnostic Code (DC) 6260 and by the previous versions of DC 6260.” VAOPGCPREC 2-2004. VAOPGCPREC 2-2004 may be subject to a narrow interpretation due to the specific nature of its holding. However, the analysis upon which the holding of that precedent opinion was based was not specific to bilateral tinnitus claims, and the rationale for the holding of that opinion applies generally to claims governed by the VCAA. As explained further below, VCAA notice is not required in connection with a claim that cannot be substantiated because no factual development could lead to an award.

5. Section 5103(a) does not require notice in a case where a claim cannot be substantiated because the very text of the statute states that notification is required only of evidence “necessary to substantiate the claim.” Logically, if a claim cannot be substantiated, then there is no evidence “necessary” to such substantiation. As we noted in VAOPGCPREC 2-2004, the two qualifiers to the statutory notice requirement, i.e., that notice is only required as to information and evidence necessary to substantiate the claim and that notice is not necessary regarding evidence previously provided, suggest congressional recognition that in some cases the criteria for providing notice will not be invoked.

6. Also, as we pointed out in VAOPGCPREC 2-2004, the provision in the second sentence of 38 U.S.C. § 5103(a) requiring VA to inform the claimant of which portion of the information or evidence “if any” is to be supplied by the claimant and which portion “if any” VA will attempt to obtain “indicates that there will be situations in which it is not necessary to request any information from the claimant.” We noted that “[o]ne such situation would be where no additional information or evidence is needed because pursuant to statute or regulation the claim cannot be substantiated.”

7. We further noted in VAOPGCPREC 2-2004, citing United States v. Female Juvenile, 103 F.3d 14, 16-17 (5<sup>th</sup> Cir. 1996), cert. denied, 522 U.S. 824 (1997), that principles of statutory interpretation call for avoidance of absurd or unreasonable results. We reasoned that a reading of 38 U.S.C. § 5103(a) that would require notice of information and evidence necessary to substantiate a claim that cannot be substantiated because it is barred by statute or regulation would be nonsensical and inconsistent with Congress’ intention that VA attempt to obtain information that could be useful in deciding a claim. See Explanatory Statement on H.R. 4864, as amended, 146 Cong. Rec. H9913, H9914 (daily ed. Oct. 17, 2000).

8. Finally, as we noted in VAOPGCPREC 2-2004, the legislative history of

38 U.S.C. §§ 5103(a) and 5103A supports the conclusion that action on VA's part under section 5103(a) is not necessary where there is no relevant information or evidence to be obtained because a claim is barred as a matter of law. As stated with regard to the provision that became section 5103A, Congress recognized that "certain claims . . . can be decided without providing any assistance or obtaining any additional evidence." H.R. Rep. No. 106-781, at 10 (2000), reprinted in 2000 U.S.C.C.A.N. 2006, 2012-13. Further, with regard to the provision that became section 5103(a), Congress contemplated notice to a claimant only with regard to information or evidence that "has some probative value." Explanatory Statement on H.R. 4864, as amended, 146 Cong. Rec. at H9914.

9. VAOPGCPREC 2-2004 involved a claim for separate ratings for each ear for bilateral tinnitus. Such a claim is barred as a matter of law because there is no authorization under statute or regulation to provide such ratings. Because a claim for a benefit for which there is no legal basis cannot be substantiated under any circumstances, there is no information or evidence that the claimant could provide to support the claim, and no notice to the claimant regarding submission of information or evidence is required by 38 U.S.C. § 5103(a). For the same reason, section 5103(a) does not require VCAA notice where an undisputed fact or set of facts render the claimant ineligible for the benefit sought. Examples of such claims would include: a claim for pension based on wartime service by a veteran whose DD-214 does not show the requisite service during a period of war as defined in 38 C.F.R. § 3.2; a claim by a veteran's brother seeking dependency and indemnity compensation; and a claim for Medal of Honor pension under 38 U.S.C. § 1562 where the veteran is not entered on the Medal of Honor roll. In all of these cases, there is no possibility that any additional notice or evidence could serve to substantiate the claim because undisputed facts render the claimant ineligible for the benefit sought. Consequently, notice under section 5103(a) is not required. [FN#1]

#### Duty to Assist (38 U.S.C. § 5103A).

10. The second question presented is whether 38 U.S.C. § 5103A requires VA to provide assistance in developing a claim that cannot be substantiated. The "duty to assist" requires VA to "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). However, VA "is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2). Thus, section 5103A(a)(2) clearly authorizes VA to refrain from providing claim development assistance where the claim cannot be substantiated as a matter of law, because in such a case there can be no reasonable possibility of substantiating the claim.

11. Although 38 U.S.C. § 5103A(g) states that VA is not “preclude[d] . . . from providing such other assistance under subsection (a) . . . as the Secretary considers appropriate,” that provision, too, is limited to assistance in “substantiating a claim.” Moreover, VA’s regulations preclude “providing assistance . . . if . . . there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim” and state that “VA will discontinue providing assistance . . . if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim.” 38 C.F.R. § 3.159(d). Specific examples of situations in which VA will refrain from providing further assistance include those where the claimant is legally ineligible for the benefit sought or is not entitled to the benefit as a matter of law. See 38 C.F.R. § 3.159(d)(1), (3).

12. Even if the plain language of the statute and VA’s implementing regulations were not clear, the legislative history shows that Congress did not intend to require that VA provide claim-development assistance to a claimant who could not be awarded the benefit sought. In VAOPGCPREC 2-2004, we quoted the House Committee on Veterans' Affairs' report that explained that the provision that became section 5103A(a):

recognize[d] 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 authorize[d] the Secretary to decide those claims without providing any assistance under this subsection.

H.R. Rep. No. 106-781, at 10, reprinted in 2000 U.S.C.C.A.N. at 2012-13. Moreover, VAOPGCPREC 8-2003 identified legislative history showing that Congress intended the VCAA “to improve the efficiency of the appeal process.” Certainly, it does not improve the efficiency of VA’s appellate process to require further proceedings on a claim for compliance with the duty-to-assist provisions of the VCAA where there is no reasonable possibility that such compliance would aid in substantiating the claim. For the foregoing reasons, assistance under 38 U.S.C. § 5103A is not required where there is no reasonable possibility that additional development could substantiate the claim because there is no legal basis for the claim or undisputed facts render the claimant ineligible for the benefit sought.

13. The CAVC has recognized that where the record has been extensively developed and there is no reasonable possibility of a changed outcome based on further development, the “VCAA’s duty to notify and duty to assist provisions are not applicable.” Wensch, 15 Vet. App. at 368; accord, Mason, 16 Vet. App. at 132; Dela Cruz, 15 Vet. App. at 149. [FN#2] We note that, although the CAVC in these cases stated that the duties to notify and to assist are “not applicable” or

not “implicated” where the claim cannot be substantiated, we believe it is more correct to say that, in the case of section 5103A, the statute specifically governs cases where there is no reasonable possibility of substantiating a claim and provides that VA “is not required to provide assistance” in such cases. 38 U.S.C. § 5103A(a)(2). Nevertheless, the cited CAVC precedents support our conclusion that the VCAA does not require notice or assistance in developing a claim that cannot be substantiated because the benefit sought is not authorized by law or the claimant is ineligible under undisputed facts.

HELD:

A. Under 38 U.S.C. § 5103(a), the Department of Veterans Affairs (VA) is not required to provide notice of the information and evidence necessary to substantiate a claim where that claim cannot be substantiated because there is no legal basis for the claim or because undisputed facts render the claimant ineligible for the claimed benefit.

B. Under 38 U.S.C. § 5103A, VA is not required to assist a claimant in developing evidence to substantiate a claim where there is no reasonable possibility that such aid could substantiate the claim because there is no legal basis for the claim or because undisputed facts render the claimant ineligible for the claimed benefit.

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<sup>1</sup> We caution that VA may be obligated to provide VCAA notice where VA has reason to doubt the accuracy of the undisputed facts.

<sup>1</sup> We note that, while certain CAVC decisions indicate that failure by VA to provide notification under 38 U.S.C. § 5103(a) is non-prejudicial error where there is no possibility that benefits could be awarded under the facts averred by the claimant, see Desbrow v. Principi, No. 02-352, 2004 U.S. App. Vet. Claims LEXIS 234, at \*8-9 (Vet. App. May 4, 2004); Valiao v. Principi, 17 Vet. App. 229, 232 (2003), the above discussion makes clear that such cases do not involve error at all; section 5103(a) does not require notice in such circumstances.