

**Department of
Veterans Affairs**

Memorandum

Date: April 19, 2011

VAOPGCPREC 1-2011

From: General Counsel (022)

Subj: Veterans Health Administration Quality-Assurance Records and Board of
Veterans' Appeals Review Authority--38 U.S.C. § 5705; 38 C.F.R.
§§ 17.500-17.511
HOOD, Werner G., Jr.

To: Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

- A. What procedures are used to designate documents as constituting Veterans Health Administration medical quality-assurance documents?
- B. What types of documents qualify as quality-assurance documents?
- C. Is the Board of Veterans' Appeals authorized to examine quality-assurance records or documents to determine whether they are protected by 38 U.S.C. § 5705?
- D. Does the Department of Veterans Affairs' duty to assist in claim development under 38 U.S.C. § 5103A require the Board of Veterans' Appeals to attempt to obtain quality-assurance records?

HELD:

A. Under 38 U.S.C. § 5705(a), records and documents created by the Department of Veterans Affairs (VA) as part of a medical quality-assurance program are confidential and privileged and may not be disclosed to any person or entity except as provided in section 5705(b). For a record or document to be protected from disclosure by section 5705(a), VA must designate the VA systematic health-care review activities to be carried out by or for VA for purposes of improving the quality of VA medical care or the utilization of VA health-care resources in VA health-care facilities, and VA must specify in regulations prescribed to implement section 5705 those activities so designated. VA has designated, at 38 C.F.R. § 17.501(a), four systematic health-care review activities to be carried out by or for VA for the stated purposes. In addition, only records or documents and parts of records or documents resulting from those activities that have been described in advance and in writing by the Under Secretary for Health (USH), a Veterans Integrated Service Network (VISN) director, or a Veterans Health Administration (VHA) medical facility director as being included under the four designated classes of healthcare quality-assurance reviews are protected by section 5705 and implementing VA regulations. Further, if the activity that generated the document was performed at a VA medical treatment facility, either the activity must have been performed by staff of

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that facility or the non-staff individuals who performed the activity must have had their roles in performing the activity designated in writing before performing the activity. Whether these statutory, regulatory, and policy requirements were met in any particular case is a matter for determination by the appropriate VHA official in the first instance and, if the VHA determination is affirmative, by the General Counsel or Deputy General Counsel on appeal.

B. The types of documents that qualify as quality-assurance documents are described in 38 C.F.R. § 17.501. They may be in written, computer, electronic, photographic, or any other form. Generally, to constitute a VHA quality-assurance record or document that is privileged and confidential, a record or document: (1) must have been produced by or for VA in conducting a medical quality-assurance activity; (2) must have resulted from a quality-assurance activity described in advance in writing by the USH, a VHA VISN director, or a health-care facility director as being within the classes of healthcare quality assurance reviews listed in 38 C.F.R. § 17.501(a); and (3) must either: (A) identify individual practitioners, patients, or reviewers; (B) contain discussions, by healthcare evaluators during a review of quality-assurance information, relating to the quality of VA medical care or the utilization of VA medical resources; (C) be individual committee, service, or study team minutes, notes, reports, memoranda, or other documents either produced by healthcare evaluators in deliberating on the findings of healthcare reviews or prepared for purposes of discussion or consideration by healthcare evaluators during a quality-assurance review; (D) be a memorandum, letter, or other document from a medical facility to a VISN director or VA Central Office that contains information generated by a quality-assurance activity; or (E) be a memorandum, letter, or other document produced by a VISN director or VA Central Office that either responds to or contains information generated by a quality-assurance activity. Clinical treatment records would generally not satisfy these criteria. Records and documents that do not qualify for protection under 38 U.S.C. § 5705(a), even if they otherwise meet the criteria under section 17.501(a)-(c) for quality-assurance documents, are described in 38 C.F.R. § 17.501(g).

C. Under 38 U.S.C. § 5705(b)(5), nothing in section 5705 is to be construed as limiting the use of quality-assurance records and documents within VA, and 38 U.S.C. § 5705(b)(1) explicitly requires disclosures of quality-assurance records or documents under certain specified circumstances. However, under 38 C.F.R. § 17.508(a), access within VA to confidential and privileged quality-assurance records and documents is restricted to employees who need such information to perform their governmental duties and who are authorized access by the VA medical facility director, VISN director, or USH, by their designees, or by VA's implementing regulations at 38 C.F.R. §§ 17.500 through 17.511. Neither section 5705(b)(1) nor VA's implementing regulations at 38 C.F.R. §§ 17.500 through 17.511 authorize disclosure of quality-assurance records or documents to an agency of original jurisdiction or the Board of Veterans' Appeals (Board) for

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purposes of adjudicating a claim or an appeal to the Secretary of a claim decision.

D. Section 5103A of title 38, United States Code, requires agencies of original jurisdiction and the Board to make reasonable efforts to request from VHA any quality-assurance records or documents that are relevant to a claim, provided the claimant furnishes information sufficient to locate the records or documents, and, if VHA denies access to the records and documents on the basis that they are protected by section 5705 and implementing regulations, to appeal VHA's denial to the Office of the General Counsel (OGC) under 38 C.F.R. § 17.506. Under 38 C.F.R. § 17.508(c), any quality-assurance record or document, whether confidential and privileged or not, may be provided to the General Counsel or any attorney within OGC, wherever located. If VHA and OGC conclude that the records and documents are protected by section 5705 and implementing regulations, VA may not consider them and rely on them in the adjudication of the claim. If VHA or OGC concludes that the records and documents are not confidential and privileged, VA may consider them in adjudicating the claim.

DISCUSSION:

Background

1. The opinion request arose from a remand by the Court of Appeals for Veterans Claims (Veterans Court) in Hood v. Shinseki, 23 Vet. App. 295 (2009). The veteran appealed a Board denial of compensation under 38 U.S.C. § 1151¹ for additional disabilities allegedly resulting from a staphylococcus infection acquired during medical treatment provided at a VA medical center (VAMC) in 2000. Id. at 295. The Board had requested the Appeals Management Center to determine whether any VA office had investigated the occurrence of staph infections at the VAMC near the time the veteran received care there. Id. at 296. The VAMC stated that "a focused review was completed" but that statutes and regulations did not permit release of the review results. Id. The Board sought the opinion of an independent medical expert instead. Id. Based on that opinion, the Board denied the claim, finding that the "infection was unquestionably the result of VA medical treatment," but it was not due to "fault on the part of VA's

¹ Section 1151 authorizes the payment of disability compensation to a veteran with a qualifying additional disability. A disability qualifies for compensation under section 1151 if: (1) it was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by VA by a VA employee or in a VA facility and (2) the proximate cause of the disability was either (a) carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of VA in furnishing the hospital care, medical or surgical treatment, or examination or (b) an event not reasonably foreseeable.

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treatment providers, and that any residual disabilities were reasonably foreseeable." Id. at 297. The Board also determined that the VAMC report "is privileged and confidential." Id. at 299.

2. On appeal, the Veterans Court held that the Board erred in relying on the expert medical opinion because the opinion was equivocal. Id. With respect to the VAMC report, the court noted that, "for [VA] to properly withhold a document as privileged, the underlying activity must comply with the requirements of 38 C.F.R. § 17.501(b)," id. at 300, and that "it is not clear to the Court why the Board, as a wholly contained subset of VA, would not be able to access the records for its own review if only to determine whether the records are indeed privileged," id. at 302. Accordingly, the court remanded for the Board to consider whether it may review medical quality-assurance records in order to determine if VA should release the documents to the veteran and to determine whether VA has complied with the statutory and regulatory provisions governing the confidentiality of quality-assurance activities. Id.

3. VA "conduct[s] a comprehensive program to monitor and evaluate the quality of health care furnished by [VHA]," which is known as "the 'quality-assurance program.'" 38 U.S.C. § 7311(a)(1). "Records and documents created by [VA] as part of a medical quality-assurance program . . . are confidential and privileged and may not be disclosed to any person or entity except as provided in [38 U.S.C. § 5705(b)]." 38 U.S.C. § 5705(a). Congress afforded such protection to quality-assurance records and documents because it was:

concerned that, unless the physicians and other health professionals participating in the program can be assured that their remarks and evaluations . . . will be kept confidential, the necessary level of candor will be lost. Further, if the results of the review activity are readily available to the public, it is likely that the staff whose activities are under review as well as, perhaps, some of their colleagues, may become extremely guarded or uncooperative in the review process. In either event, the Committee believes that a failure to provide confidentiality for [quality-assurance] reports could seriously undermine the value of the review process under the [quality-assurance] program—and, ultimately, adversely affect the quality of care being provided in VA health-care facilities.

S. Rep. No. 96-876, at 31 (1980). The term "medical quality-assurance program" is defined "with respect to any activity carried out on or after October 7, 1980," as "a [VA] systematic health-care review activity designated by the Secretary to be carried out by or for [VA] for" "the purpose of improving the quality of medical care or improving the utilization of health-care resources in [VA] health-care facilities." 38 U.S.C. § 5705(c)(1) and (2).

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Procedures to Designate Documents as Quality-Assurance Documents

4. Congress required the Secretary to prescribe regulations to carry out section 5705 and, in prescribing such regulations, to "specify . . . those activities which the Secretary has designated under [section 5705(c)(2)]." 38 U.S.C. § 5705(d)(1). "An activity may not be considered as having been designated as a medical quality-assurance program . . . unless the designation has been specified in such regulations." 38 U.S.C. § 5705(d)(2). Accordingly, VA promulgated regulations at 38 C.F.R. §§ 17.500 through 17.511 "to specify and provide for the limited disclosure of those quality[-]assurance documents which are confidential under the provisions of [section] 5705." 38 C.F.R. § 17.500(b). VA also designated in regulation four classes of healthcare quality-assurance reviews that are considered confidential and privileged for purposes of VA's current medical quality-assurance program: (1) monitoring and evaluation reviews; (2) focused reviews; (3) VA Central Office or Regional general oversight reviews; and (4) contracted external reviews. 38 C.F.R. § 17.501(a). With respect to "focused reviews," the regulation provides the following details:

Focused reviews which address specific issues or incidents and which are designated by the reviewing office at the outset of the review as protected by 38 U.S.C. [§] 5705 and the regulations in §§ 17.500 through 17.511; focused reviews may be either:

(i) Facility focused reviews; [or]

(ii) VA Central Office or Regional focused reviews[.]

38 C.F.R. § 17.501(a)(2). Thus, for a record or document to be protected from disclosure under section 5705(a), section 5705 requires VA to: (1) designate the VA "systematic health-care review activity" to be carried out by or for VA for the purpose of improving the quality of VA medical care or the utilization of VA health-care resources in VA health-care facilities; and (2) specify in regulations implementing section 5705 those activities so designated.

5. VA has imposed an additional procedural requirement for documents or parts of documents to be protected by section 5705(a) and implementing regulations, that they meet the criteria in 38 C.F.R. § 17.501(b) and (c). 38 C.F.R. § 17.501(a). Section 17.501(b) provides:

The Under Secretary for Health, Regional Director[,] or facility Director will describe in advance in writing those quality assurance activities included under the classes of healthcare quality assurance reviews listed in [section 17.501(a)]. Only documents and parts of documents resulting from those activities which have been so described are protected by 38 U.S.C. [§] 5705 and the regulations in §§ 17.500 through 17.511.

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38 C.F.R. § 17.501(b). Thus, section 17.501(b) requires an advance written description of the activities included under the four classes of healthcare quality-assurance reviews listed in section 17.501(a) for a document related to a quality-assurance review to be protected from disclosure by section 5705(a) and implementing regulations. See Bethel v. United States, 242 F.R.D. 580, 586 (D. Colo. 2007) (document not privileged and confidential under section 5705 because Government failed to demonstrate that root cause analysis was designated by the reviewing office at the outset of the review as protected). "If an activity is not described in a VA Central Office or Regional policy document [i.e., described by the USH or a VHA VISN director²], this requirement may be satisfied at the facility level by description in advance of the activity and its designation as protected in the facility quality assurance plan or other policy document." 38 C.F.R. § 17.501(b).

6. VHA also has imposed an additional requirement for documents to be protected by section 5705(a) and implementing regulations:

An additional requirement is that if the activity which generated the document was performed at a VA medical treatment facility, it must have been performed by staff of that facility or there must have been prior written designation of the role of individuals who were not staff at the facility in performing the review.

VHA Directive 98-016, Quality Management³ Activities Which Can Generate Confidential Documents, para. 2.c. (Mar. 12, 1998), superseded by later directives.⁴ VHA Directive 98-016 primarily described the "core activities at all VHA medical facilities which can generate records protected by 38 U.S.C. [§] 5705 and the amended regulations," but permitted VISN and facility directors to supplement the list for facilities under their control by describing additional quality management activities that could generate records protected by section 5705 and implementing regulations. Id. at para. 4.a.(1). With respect to "Focused Reviews which address specific issues . . . or specific incidents . . . and which are designated by the responsible office at the outset of the review as protected by 38 U.S.C. [§] 5705 and its implementing regulations," the directive described "Quality Improvement Checklist[s]," "National Comparative Performance Analyses," "VISN and VHA Headquarters trending and analysis of

² VHA Regional directors have been replaced by VISN directors. See VHA Directive 2008-077, Quality Management and Patient Safety Activities That Can Generate Confidential Documents, para. 2.a. (Nov. 7, 2008).

³ VHA Directive 98-016 used the terms "quality management" and "quality assurance" interchangeably. VHA Directive 98-016, para. 2.a.

⁴ Although later VHA directives superseded VHA Directive 98-016, the pertinent provisions remain in effect to this day. See VHA Directive 2008-077 (Nov. 7, 2008). We refer to VHA Directive 98-016 because it was in effect when Mr. Hood received the VA care relevant to this opinion.

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facility quality management documents and data, such as adverse drug reaction reports and reports of adverse events," "Root Cause Analysis," and "Patient Safety Registry." Id. at para. 4.b.(2)(a)-(e) (as amended by VHA Directive 98-016, Change 1 (Oct. 20, 1999) and Change 2 (June 29, 2000) (adding subparagraphs (d) and (e) to paragraph 4.b.(2) of VHA Directive 98-016)). Thus, VHA Directive 98-016 required that, if a quality-assurance activity that generated a document was performed at a VA medical treatment facility, either the activity must have been performed by staff of that facility or the non-staff individuals who performed the activity must have had their roles in performing the activity designated in writing before performing the activity.

7. As explained below, whether the applicable statutory, regulatory, and policy procedures were followed with respect to documents relating to the "focused review" in Hood is a matter to be decided by the appropriate VHA official in the first instance and, if that determination is affirmative, by the General Counsel or Deputy General Counsel on appeal. Also, disclosure of quality assurance records and documents that are not confidential and privileged under section 5705 and VA's implementing regulations is governed by the provisions of the Freedom of Information Act and, if applicable, the Privacy Act and any other VA or Federal confidentiality statutes. 38 C.F.R. § 17.502(a).

Documents that Qualify as Quality-Assurance Documents

8. Section 17.501 describes the documents that qualify as quality-assurance documents protected by section 5705 and implementing regulations. First, "[o]nly documents and parts of documents resulting from those activities which have been [described in advance in writing by the USH, VISN director, or facility director] are protected by" section 5705 and implementing regulations. 38 C.F.R. § 17.501(b). In addition, documents can be protected whether they are in written, computer, electronic, photographic, or any other form and whether they are prepared at a local medical facility, at the VISN level, at VA Central Office, or by external contractors performing healthcare quality-assurance reviews. 38 C.F.R. § 17.501(d) and (e). More importantly:

Documents and parts of documents generated by activities which meet the criteria in [section 17.501(a) and (b)] shall be confidential and privileged only if they:

(1) Identify, either implicitly or explicitly, individual practitioners, patients, or reviewers except as provided in [section 17.501(g)(6)]; or

(2) Contain discussions relating to the quality of VA medical care or utilization of VA medical resources by healthcare evaluators during the course of a review of quality assurance information or

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data, even if they do not identify practitioners, patients, or reviewers; or

(3) Are individual committee, service, or study team minutes, notes, reports, memoranda, or other documents either produced by healthcare evaluators in deliberating on the findings of healthcare reviews, or prepared for purposes of discussion or consideration by healthcare evaluators during a quality assurance review; or

(4) Are memoranda, letters, or other documents from the medical facility to the Regional Director or VA Central Office which contain information generated by a quality assurance activity meeting the criteria in § 17.501(a) and (b); or

(5) Are memoranda, letters, or other documents produced by the Regional Director or VA Central Office which either respond to or contain information generated by a quality assurance activity meeting the criteria in § 17.501(a) and (b).

38 C.F.R. § 17.501(c). Clinical treatment records would generally not satisfy these criteria.

9. Section 17.501 also describes documents that are not protected by section 5705 and implementing regulations, even if the documents satisfy the criteria in paragraphs (a) through (c) of section 17.501. Unprotected documents include statistical information regarding VA healthcare programs or activities that does not explicitly or implicitly identify individual VA patients, VA employees, or individuals involved in the quality assurance process; summary documents or records that identify only study topics, the period of time covered by the study, and major overall findings, but do not identify individual healthcare practitioners; contents of credentialing and privileging folders; patient satisfaction survey questionnaires; and records and documents developed pursuant to Boards of Investigations, licensing reviews, site visits by the Office of the Medical Inspector, data validation activities, and occupational health monitoring records. See 38 C.F.R. § 17.501(g). Together, the provisions of section 17.501 define the types of records or documents protected from disclosure by 38 U.S.C. § 5705 and VA regulations. To constitute a VHA quality-assurance document that is privileged and confidential, a document:

(a) must have been produced by or for VA in conducting a medical quality-assurance activity;

(b) must have resulted from a quality-assurance activity described in advance in writing by the USH, a VHA VISN Director, or a healthcare facility director as being within the classes of healthcare quality-assurance reviews listed in 38 C.F.R. § 17.501(a); and

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(c) must either:

(1) identify individual practitioners, patients, or reviewers;

(2) contain discussions, by healthcare evaluators during a review of quality-assurance information, relating to the quality of VA medical care or the utilization of VA medical resources;

(3) be individual committee, service, or study team minutes, notes, reports, memoranda, or other documents either produced by healthcare evaluators in deliberating on the findings of healthcare reviews or prepared for purposes of discussion or consideration by healthcare evaluators during a quality-assurance review;

(4) be a memorandum, letter, or other document from a medical facility to a VISN director or VA Central Office that contains information generated by a quality-assurance activity; or

(5) be a memorandum, letter, or other document produced by a VISN director or VA Central Office that either responds to or contains information generated by a quality-assurance activity.

The Board May Not Review Protected Documents

10. Section 5705(b) explicitly requires disclosures of quality-assurance documents under certain specified circumstances. 38 U.S.C. § 5705(b)(1); Hood, 23 Vet. App. at 300. Disclosure to a VA benefit claim adjudicator, even for the limited purpose of determining whether the documents are in fact privileged or whether they may be released to an involved veteran, is not one of the disclosures explicitly authorized by section 5705(b)(1). Further, disclosure to the Board is not authorized by section 5705(b)(1). Nonetheless, "[n]othing in [section 5705] shall be construed as limiting the use of records and documents described in [section 5705(a)] within [VA] (including contractors and consultants of [VA])." 38 U.S.C. § 5705(b)(5); Hood, 23 Vet. App. at 300 ("section 5705 does not prohibit the release of medical quality assurance records within VA").

11. Consistent with that statutory mandate, VA regulations allow access within VA to otherwise protected documents but restrict such access to "employees . . . who have a need for such information to perform their government duties . . . and who are authorized access by the VA medical facility Director, [VISN] Director, the [USH], or their designees or by the regulations in §§ 17.500 through 17.511." 38 C.F.R. § 17.508(a). As with the underlying statute, disclosure to a benefit claim adjudicator or the Board, even for the limited purpose of determining whether documents are actually protected by 38 U.S.C. § 5705 or may be released to an involved veteran, is not among the disclosures authorized by sections 17.500 through 17.511. Thus, although in this particular case the

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Veterans Court remanded to the Board to “consider whether [the Board] may review medical quality assurance records in order to determine if VA should release the documents to [Mr. Hood],” 23 Vet. App. at 302, the governing statute and regulations do not authorize Board access to any quality-assurance records or documents, even for the limited purpose of making those determinations.

12. The Board's recourse is to request access to the records from the USH, the director of the VISN comprising the VHA medical facility involved in the claim, or the VHA medical facility director. A denial by any of those officials of access to the requested documents can be appealed within 60 days to the General Counsel for a final decision.⁵ See 38 C.F.R. § 17.506. Furthermore, section 17.508(c) authorizes the release of a quality-assurance document, even if “confidential and privileged,” to the General Counsel or any attorney within OGC. 38 C.F.R. § 17.508(c). Thus, an OGC attorney with expertise in information law can review the matter and make a recommendation to the General Counsel or Deputy General Counsel for a final decision as to whether the documents are protected under section 5705. See 38 C.F.R. § 17.506. If OGC determines that the requested records or documents are protected by section 5705 and implementing regulations, Board access would be denied. If OGC determines that the requested records or documents are not protected by section 5705 or implementing regulations, Board access would be granted.

13. In summary, the Board is not authorized to examine quality-assurance records or documents to determine whether they are protected by 38 U.S.C. § 5705 and implementing regulations. If the USH, VISN director, or VHA medical facility director denies the Board's request for access to such records, the Board may appeal the denial of access to quality-assurance records or documents to the General Counsel, who is authorized access without regard to whether the documents are privileged and confidential.

Duty to Assist

14. Section 5103A of title 38, United States Code, requires VA to “make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit.” 38 U.S.C. § 5103A(a)(1).⁶

⁵ If the reason for such a denial is that the requested records or documents no longer exist or cannot be found, an appeal to the General Counsel would not be appropriate because such a determination does not involve a legal determination subject to General Counsel review.

⁶ Section 5103A(b) requires VA to make reasonable efforts to obtain relevant records that the claimant authorizes VA to obtain, and section 5103A(c) requires VA, in a disability compensation claim, to obtain relevant VA records of medical treatment or examination of the claimant and any other relevant records held by a Federal department or agency that the claimant authorizes VA to obtain. 38 U.S.C. § 5103A(b)(1), (c)(2) and (3).

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Although VA quality-assurance records relating to an event at a VAMC that forms the basis for a compensation claim under section 1151 might contain information pertinent to the claim, such records would not necessarily be necessary to substantiate the claim. A private or VA medical opinion on whether the hospital care, medical or surgical treatment, or examination at issue satisfied the applicable standard of care might be sufficient for those purposes. Moreover, any attempt by VA to assist a claimant in obtaining such records would create a conflict between VA's duty to assist under section 5103A and its duty to protect the "confidential and privileged" quality-assurance records under section 5705 and implementing regulations. Were VA claim adjudicators to obtain VA quality-assurance records and consider them in denying a claim, they would be required to: (1) include those records in the claimant's claims file, see 38 C.F.R. § 3.103(d) (requiring any evidence, whether documentary, testimonial, or in other form, offered by a claimant "be included in the records"); cf. Veterans Benefits Administration Adjudication Procedures Manual M21-1MR, Part III, Subpart iv, ch. 7, sec. A, para. 1.a (mandating that all evidence pertinent to a rating decision be retained in the claims folder); (2) disclose the information in those records to the claimant and any claim representative the claimant might have, 38 U.S.C. §§ 5104(b) (requiring VA to summarize, in notice to the claimant and any representative of a claim denial, the evidence considered), 7105(d)(1)(A) (requiring a summary of the evidence in a statement of the case); 38 C.F.R. § 3.103(f) ("any notice that VA has denied a benefit sought will include a summary of the evidence considered"), and (3) disclose the information in those records to the Veterans Court in the event of an appeal, 38 U.S.C. § 7252(b) (mandating the court's review to be "on the record of proceedings before the Secretary and the Board"). Such redisclosures of confidential and privileged information would violate the statutory prohibition that "[n]o person or entity to whom a record or document has been disclosed under [section 5705(b)] shall make further disclosure of such record or document except for a purpose provided in [section 5705(b)]." 38 U.S.C. § 5705(b)(3); see 38 C.F.R. §§ 17.507(a) ("All VA employees . . . who have access to records designated as confidential and privileged under 38 U.S.C. [§] 5705 and the regulations in §§ 17.501 through 17.511 will treat the findings, views, and actions relating to quality assurance in a confidential manner."), 17.510 (reflecting statutory prohibition). Failing to ensure the confidentiality of quality-assurance records would be contrary to statutory and regulatory requirements and would seriously undermine the quality-assurance process and, ultimately, adversely affect the quality of care provided in VA healthcare facilities.

15. When two statutes appear to conflict and Congress has not clearly indicated which statute is to prevail, the statutes must be interpreted "in a way that preserves the purposes of both and fosters harmony between them." Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1347 (Fed. Cir. 1999) (quoting Vornado Air Circulation Sys., Inc. v. Duracraft Corp., 58 F.3d 1498, 1507 (10th Cir. 1995)). Sections 5103A and 5705 appear to conflict: Section 5103A, to help

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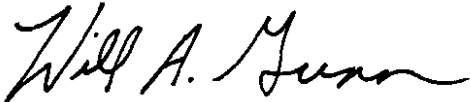
a claimant substantiate a claim for VA benefits, requires VA to assist in obtaining evidence to do so, but section 5705, to foster an atmosphere in which health-care reviewers will candidly critique medical procedures and practices, prohibits VA from disclosing protected information from medical quality-assurance records and documents except as specifically authorized. "[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Morton v. Mancari, 417 U.S. 535, 550-51 (1974); Zimick v. West, 11 Vet. App. 45, 51 (1998). In this case section 5705, although enacted before section 5103A, is the more specific statute. Section 5103A as applicable to this case creates a duty with respect to evidence in general, and specifically with respect to certain broad classes of records, but does not address the specific subject of quality-assurance records, whereas section 5705 imposes a prohibition with respect to a single category of evidence, specifically, quality-assurance records and documents. Nothing indicates that Congress, by requiring VA to assist claimants in substantiating their claims, intended to repeal its near-absolute stricture against public disclosure of quality-assurance records.

16. However, consistent with our conclusion above that OGC attorneys are authorized to examine quality-assurance records or documents to determine whether they are protected by section 5705 and implementing regulations and in order to give effect to both statutes to the extent possible, we conclude that VA's duty to assist under section 5103A(a) requires agencies of original jurisdiction and the Board to request access to any quality-assurance records or documents relevant to a claim, provided the claimant furnishes information sufficient to locate the records or documents, and, if the appropriate VHA officials deny the request on the basis that the records or documents may not be disclosed because they are privileged and confidential, to appeal the determination to the General Counsel. This limited duty gives as much effect as possible to Congress' mandate to assist claimants in the substantiation of their claims, without abrogating Congress' mandate to protect quality-assurance records and documents from unauthorized disclosures. If VHA or OGC concludes that requested records and documents are not confidential and privileged, the records and documents may be considered in deciding the claim. If, however, VHA and OGC conclude that the records and documents are protected by section 5705 and implementing regulations, then neither the Board nor the agency of original jurisdiction may consider them or rely on them in adjudicating the claim. Section 7104(a) of title 38, United States Code, requires that Board decisions "be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law." In our view, quality-assurance records or documents that are protected under section 5705 and VA's implementing regulations, and therefore unavailable for consideration in deciding a benefit claim, cannot be considered "evidence and material of record" within the meaning of section 7104(a). There is a conflict between sections 5705 and 7104(a). Again guided by the canon of statutory construction that "a specific statute will not be controlled or nullified by a general one, regardless of the

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priority of enactment," Mancari, 417 U.S. at 550-51; Zimick, 11 Vet. App. at 51, we conclude that the general mandate of section 7104(a) must yield to the specific mandate of section 5705. Therefore, withholding protected quality-assurance records or documents, even if pertinent to a claim, would not violate the mandate of section 7104(a).

A handwritten signature in black ink, reading "Will A. Gunn". The signature is written in a cursive style with a large initial "W" and a long, sweeping underline.

Will A. Gunn

cc: Acting Under Secretary for Benefits (20)