

**Department of
Veterans Affairs**

Memorandum

VAOPGCPREC 2-2014

Date: May 19, 2014

From: General Counsel (022)

Subj: Applicability of the Veterans Claims Assistance Act of 2000 to Decisions Concerning Benefits Administered by the National Cemetery Administration.

To: Under Secretary of Memorial Affairs (40)

QUESTION PRESENTED:

Are claims for burial benefits administered by the National Cemetery Administration (NCA) subject to the notice requirements in section 5103 of title 38, United States Code, in light of the unique time requirements associated with such claims?

HELD:

The notice requirements of 38 U.S.C. § 5103 apply to all claims for benefits administered by the Department of Veterans Affairs (VA), including claims for benefits administered by NCA. However, NCA may determine that notice under 38 U.S.C. § 5103 is unnecessary in particular cases, either because VA has sufficient evidence to grant the requested benefit or because applicable law and undisputed facts establish that the claimant is ineligible for the claimed benefit. Further, pursuant to a recent amendment to section 5103(a), NCA may provide the notice required by that section "by the most effective means available," which may include providing such notice on a benefit application form or transmitting it to the claimant electronically. Finally, NCA has discretion to adopt reasonable procedures for applying the requirements of section 5103 in the context of time-sensitive claims for burial benefits.

DISCUSSION:

1. VA's provision of notice of the information and evidence necessary to substantiate a claim for benefits under the laws administered by VA is governed by 38 U.S.C. § 5103, as amended by section 3(a) of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, § (3)(a), and again amended by section 504 of the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 504(a). Notice pursuant to section 5103 is commonly referred to as "VCAA notice." Current section 5103(a)(1) provides:

The Secretary shall provide to the claimant and the claimant's representative, if any, by the most effective means available, including electronic communication or notification in writing, notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part

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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.

2. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984), the first step in analyzing the meaning of a statute requires a determination, employing “traditional tools of statutory construction,” concerning “whether Congress has directly spoken to the precise question at issue.” See also *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). The starting point in every statutory construction analysis is the plain meaning of the statutory text. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977); *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998). If the statute’s text does not explicitly address the precise question, then other tools of construction should be utilized including “the statute’s structure, canons of statutory construction, and legislative history.” *Timex V.I.*, 157 F.3d at 882. In this case, the meaning of the statute can be determined by reference to the statutory text, legislative history, and established judicial and administrative interpretations of terms that Congress incorporated into the VCAA.

3. As amended by the VCAA in 2000, section 5103 broadly applies to “claimants.” Under 38 U.S.C. § 5100, as added by the VCAA, the term “claimant” means “any individual applying for, or submitting a claim for, any benefit under the laws administered by the Secretary.” In enacting the VCAA, Congress stated that the purpose of defining the word “claimant” was “to ensure that the Secretary will provide applications and assistance to persons whose status as a veteran is not yet determined.” H.R. Rep. No. 106-781, at 9 (2000), *reprinted in* 2000 U.S.C.C.A.N. 2006, 2012. Congress further explained that, “[s]imilarly, the Secretary would be obligated to respond to applications by persons who claim eligibility for or entitlement to a VA benefit by reason of their relationship to a veteran.” *Id.* We believe the language and history of the VCAA make it clear that Congress intended to require VA, generally, to provide notice and claims assistance to any individual claiming entitlement to VA benefits as a Veteran or based on their relationship to a Veteran, even if it is not yet established that the claimant is a Veteran or is eligible to claim benefits based on their relationship to a Veteran.

4. Although the term “benefit” is not defined by statute, courts have generally treated the interpretation of that term in the regulation of the Board of Veterans’ Appeals at 38 C.F.R. § 20.3(e) as reflecting VA’s interpretation of that term. See *Schroeder v. West*, 212 F.3d 1265, 1269 n.4 (Fed. Cir. 2000); *West v. Brown*, 7 Vet. App. 329, 338 (1995). Section 20.3(e) defines “benefit” to refer to “any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by [VA]

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pertaining to veterans and their dependents and survivors.” The VCAA revised and superseded provisions formerly in 38 U.S.C.A. § 5107(a) (1991) concerning VA’s duty to assist “a person who submits a claim for benefits” and, in so doing, the VCAA incorporated terms from the prior statute. In employing the term “benefits” in the VCAA, Congress is presumed to have understood and intended that VA’s established interpretation of that term would apply to the VCAA. See *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute”). Consistent with the definition in section 20.3(e), which was in effect when Congress enacted the VCAA, we believe that NCA benefits, such as burial in a national cemetery and the provision of headstones and markers, fall within the intended scope of the term “benefits” as that term is used in section 5100. This conclusion is further supported by the legislative history of subsequent revisions to section 5103. In a report concerning a 2008 amendment to section 5103, the Senate Committee on Veterans’ Affairs explained that, under that statute, VA would not be required to provide VCAA notice in a case where it already had sufficient information to decide the claim and, by way of example, it noted that “claims for . . . burial benefits might contain sufficient information and evidence to substantiate the claim without the necessity of a VCAA notice.” S. Rep. 110-449, at 9 (2008), *reprinted in* 2008 U.S.C.C.A.N. 1722, 1731. In noting that claims for burial benefits could, in those specific circumstances, be decided without the need for notice under section 5103, the Committee indicated its understanding that the provisions of section 5103 generally apply to such claims in other circumstances. Accordingly, based upon the statutory language and legislative history and the broader context of VA’s regulations, we believe Congress intended that the term “claimant” as defined in section 5100 and as used in section 5103(a) would include an individual applying for burial benefits administered by NCA. We recognize that claims for burial benefits often are highly time-sensitive, because the survivors of a deceased Veteran or other person for whom burial benefits are claimed may have a limited time in which to make arrangements for burial and will therefore have an urgent need to know whether VA will provide burial benefits. Although Congress is undoubtedly aware of the time-sensitive nature of such claims, it has not allowed for any exception to the broad applicability of section 5103 for claims for burial benefits based upon timing considerations.

5. Departure from the literal requirements of a statute may be justified in narrow circumstances where a literal construction would yield absurd results or impose an impossible standard. See *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 636 F.2d 1267, 1283 (D.C. Cir. 1980). However, the Supreme Court has narrowly defined any such exception to apply only where a particular result was so absurd that Congress could not have intended it. See *Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993). “[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”

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Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), and *Caminetti v. United States*, 242 U.S. 470, 485 (1917)) (internal quotation marks omitted). It does not appear that interpreting section 5103 literally to apply to claims for burial benefits would have absurd results Congress could not have intended. First, as noted above, there is evidence that Congress understands section 5103 to apply to claims for burial benefits. Second, it is not clear that requiring VA to provide notice under section 5103 generally would preclude VA from rendering decisions within the time frame necessary to burial benefit claims. Third, as discussed below, VA has discretion under section 5103 to adopt reasonable procedures for complying with section 5103 while minimizing the risk of any delay that would defeat the purpose of VA burial benefits.

6. Although the unique time requirements applicable to claims for burial benefits do not provide a basis for foregoing the notice required by section 5103(a), the statutory language indicates that VA is not required to provide such notice in some circumstances that may arise in claims for burial benefits. In VAOPGCPREC 2-2004, we held that VA was not required to provide notice of the information and evidence necessary to substantiate a claim for separate disability ratings for tinnitus in each ear, because VA regulations bar separate ratings for tinnitus in each ear and there is thus no information or evidence that could help substantiate such a claim. Further, in VAOPGCPREC 5-2004, we explained that VA is not required to provide VCAA notice under 38 U.S.C. § 5103(a) where further evidentiary development could not result in the claim being substantiated “because there is no legal basis for the claim or because undisputed facts render the claimant ineligible for the claimed benefit.”¹ In those opinions, we explained that section 5103(a) requires VA to provide the claimant notice of the information and

¹ The examples we provided include the following factual scenarios:

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.

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evidence, “if any,” that is necessary to substantiate the claim and that the phrase “if any” indicates that there will be situations in which there will be no need for further information or evidence and thus no need to provide notice under section 5103(a). VAOPGCPREC 5-2004, para. 6; VAOPGCPREC 2-2004, para. 2. We further noted that the legislative history of the VCAA reflected Congress’ understanding 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. VAOPGCPREC 5-2004, para 8; VAOPGCPREC 2-2004, para. 4. The United States Court of Appeals for Veterans Claims (Veterans Court) has held that the notice and assistance requirements of the VCAA do not apply when there is no reasonable possibility that further development would aid the appellant in substantiating the claim. *See Mason v. Principi*, 16 Vet. App. 129, 132 (2002) (VCAA requirements not applicable because statute, not evidence, was dispositive of peacetime Veteran’s claim for pension); *see also Valiao v. Principi*, 17 Vet. App. 229, 232 (2003) (where the facts averred by the claimant could not establish entitlement, any notice error under the VCAA is nonprejudicial). The Veterans Benefits Administration (VBA) has issued regulations at 38 C.F.R. § 3.159(b)(3)² consistent with these holdings.

7. Therefore, to the extent claims for burial benefits involve established and undisputed facts that would preclude granting the benefit, NCA could forego the provision of VCAA notice and explain in its decision why such notice was not needed. Thus, for example, if a claimant seeks eligibility for burial in a VA national cemetery based upon undisputed facts that clearly preclude entitlement under 38 U.S.C. § 2402, VA would not be required to provide notice under section 5103(a) because the statute would be dispositive of the claim and further development would create no reasonable possibility of substantiating the claim. In VAOPGCPREC 5-2004, footnote 1, however, we cautioned that VA may be obligated to provide VCAA notice where VA has reason to doubt the accuracy of the otherwise undisputed facts.

8. NCA also may forego notice and assistance in cases in which it finds that the undisputed facts in VA records or submitted with the application clearly establish entitlement to the benefit. In 2008, Congress revised section 5103(a) to include provisions authorizing VA to issue regulations governing the content of the notice required by that statute in relation to various types of benefits provided by VA. In discussing the requirements of section 5103, the Senate Committee on Veterans’ Affairs indicated its understanding that VCAA notice is not required if VA can award the requested benefit based on information available when it receives an application. The Committee stated:

² “No duty to provide the notice described in paragraph (b)(1) of this section arises: . . . (ii) When, as a matter of law, entitlement to the benefit claimed cannot be established.” 38 C.F.R. § 3.159(b)(3).

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The Committee emphasizes that VCAA notices are required only in cases in which additional information or evidence is needed to substantiate the claim. If the information and evidence needed to substantiate the claim is submitted with the application or contained in the claims file, no VCAA notice is required. For example, claims for education, housing, vocational rehabilitation, and burial benefits might contain sufficient information and evidence to substantiate the claim without the necessity of a VCAA notice.

S. Rep. 110-449, at 9 (2008), *reprinted in* 2008 U.S.C.C.A.N. at 1731.

9. Further, sections 504 and 505 of Public Law 112-154 recently added provisions in sections 5103 and 5103A stating that those sections shall not apply if the evidence of record allows the Secretary to award the maximum benefit in accordance with title 38, United States Code, based on the evidence of record. See 38 U.S.C. §§ 5103(b)(5)(A) and 5103A(b)(3)(A). Congress has defined “maximum benefit” as “the highest evaluation assignable in accordance with the evidence of record, as long as such evidence is adequate for rating purposes and sufficient to grant the earliest possible effective date in accordance with section 5110 of this title.” 38 U.S.C. §§ 5103(b)(5)(B) and 5103A(b)(3)(B). Although that definition is clearly oriented towards disability compensation claims, the principle that VA need not provide VCAA notice when it can fully grant the claim plainly applies to other benefits, including burial benefits, under the plain language of the statute and the relevant legislative history. Thus, when VA can fully grant a claim for burial benefits, the requirements of 5103 and 5103A do not apply.

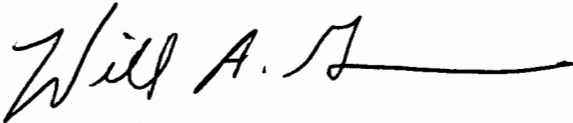
10. Even in cases where notice under section 5103 is required, recent amendments to section 5103 provide for minimizing any delay associated with the provision of such notice. Section 504 of Public Law 112-154 removed from section 5103 the requirement that VA provide notice only after it has received a complete or substantially complete application. Further, as revised by section 504 of Public Law 112-154, section 5103(a) now permits VA to provide notice “by the most effective means available, including electronic communication or notification in writing.” The legislative history explains that these changes would allow VA to provide section-5103 notice on the VA application form, where appropriate, rather than as a separate procedural step after receipt of a claim. *Joint Explanatory Statement For Certain Provisions Contained In The Amendment To H.R. 1627, As Amended*, at 28 (available at <http://veterans.house.gov/hr1627> (last visited October 7, 2013)). Alternatively, the revised statute would permit VA to provide notice by e-mail or other efficient means.

11. The plain language of section 5103(a) gives VA discretion to determine the manner and timing of the provision of notice under that section. We note that VA would also have discretion to formulate procedures that reasonably implement section 5103(a) in the context of time-sensitive burial-benefit claims. In such claims, it may be necessary

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for VA to take immediate development actions, such as making telephonic requests for confirmation of a Veteran's service or other needed evidence. Nothing in section 5103(a) would require VA to delay such actions until it had provided notice under section 5103(a). Accordingly, VA's procedures may recognize that some development may occur in advance of the provision of notice under section 5103(a) and that such actions may obviate the need for such notice by yielding information sufficient to decide the claim. Further, when VA provides notice under section 5103(a), the claimant may submit the requested information or evidence within one year after the request, but VA is not precluded from deciding the claim at an earlier date. 38 U.S.C. § 5103(b)(3). This provision gives VA discretion to render decisions within a time frame appropriate to carry out the purposes of the burial-benefits program, subject to readjudication of the claim if the claimant submits the requested information or evidence within the one-year period. VBA regulations permit a decision on a claim if the claimant has not responded within 30 days to VA's notice under section 5103(a). 38 C.F.R. § 3.159(b)(1). However, NCA could adopt a different time frame as necessary or appropriate to the unique circumstances of a burial-benefit claim.

A handwritten signature in black ink, appearing to read "Will A. Gunn", with a long horizontal line extending to the right.

Will A. Gunn

cc: Under Secretary for Benefits (20)
Acting Chairman, Board of Veterans' Appeals (01)