

**Department of  
Veterans Affairs**

# Memorandum

Date: February 24, 2004 VAOPGCPREC 1-2004

From: General Counsel (022)

Subj: Effect of *Pelegri v. Principi* Concerning Content of Notice Provided to Claimants Under 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)

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

**QUESTION PRESENTED:**

Does the decision of the United States Court of Appeals for Veterans Claims (CAVC) in *Pelegri v. Principi*, No. 01-944, 2004 U.S. App. Vet. Claims LEXIS 11 (Jan. 13, 2004), require that notice provided under 38 U.S.C. § 5103(a) contain a request that the claimant provide the Department of Veterans Affairs (VA) with any evidence in his or her possession that pertains to the claim?

**COMMENTS:**

1. Our staffs have discussed the question of whether the CAVC's decision in *Pelegri* establishes that the notice required under 38 U.S.C. § 5103(a), as amended by the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, must contain a request that the claimant provide VA with any evidence in his or her possession that pertains to the claim. Section 5103(a) of title 38, United States Code, as amended by section 3(a) of the VCAA, provides:

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.

VA's regulation implementing this statute provides in part:

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When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim.

38 C.F.R. § 3.159(b)(1).

2. In *Pelegri*, the CAVC vacated a Board of Veterans' Appeals (Board) decision that found that no new and material evidence had been presented to reopen Mr. Pelegri's service-connection claim and remanded the matter to VA for further development and readjudication. In the Board decision that was the subject of the appeal, the Board acknowledged that the Regional Office had implicitly reopened the claim and adjudicated it on its merits, but, after independently reviewing the issue, the Board determined that material evidence had not been submitted and the claim could not, therefore, be reopened. *Pelegri*, 2004 U.S. App. Vet. Claims LEXIS 11, at \*6-7. On appeal to the CAVC, Mr. Pelegri argued that the Board erred by (1) adjudicating his claim as a claim to reopen without notifying him beforehand of its intention to do so and allowing him the opportunity to present evidence and argument on that issue, and (2) failing to give notice to him under 38 U.S.C § 5103(a) of what medical or lay evidence was necessary to substantiate his claim. *Pelegri*, at \*7-8. In addition, in response to an order from the CAVC for further briefing, Mr. Pelegri argued that *Quartuccio v. Principi*, 16 Vet. App. 183 (2002), requires that his case be remanded for VA to comply with the mandatory notice requirements in section 5103(a) and (b). *Pelegri*, at \*9. Regarding section 5103, VA argued that, although the Board did not address the notice requirements in section 5103(a), in this case VA adequately notified Mr. Pelegri at a hearing of the information and evidence necessary to substantiate his claim and of which portion of such information or evidence was to be provided by him and which portion was to be provided by VA. *Pelegri*, at \*10. Mr. Pelegri replied, stating that he is entitled to "mandatory 'preadjudicatory' notices under [section] 5103(a) and (b)." *Id.*

3. The CAVC found that the Board improperly adjudicated Mr. Pelegri's claim as a claim to reopen rather than an original claim and vacated the Board decision and remanded the matter. *Id.* at \*34-36. The CAVC held that the notice provisions of section 5103(a), as amended by the VCAA, apply to cases pending before VA at the time of the enactment of the VCAA on November 9, 2000. *Id.* at \*13-19. The CAVC also held that, as the administrative proceedings on Mr. Pelegri's claim were ongoing on November 9, 2000, section 5103(a), as amended by the VCAA, was applicable to Mr. Pelegri's claim when it was

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pending before the Board, and that, therefore, the Board was required to consider this law in connection with Mr. Pelegrini's claim. *Id.* at \*17-19. Accordingly, the CAVC reviewed the appeal in light of section 5103(a) and VA's implementing regulation, 38 C.F.R. § 3.159(b). *Pelegrini*, at \*19. The CAVC then held that notice under section 5103(a) and 3.159(b) must precede an initial unfavorable decision by the agency of original jurisdiction (AOJ). *Id.* at \*28.

4. The CAVC specifically stated "the Court holds that under section 5103(a), before an initial unfavorable AOJ decision on the claim, a service-connection claimant must be given notice of the three matters specified in the statute and one additional matter specified in the regulation, [38 C.F.R. § 3.159(b)(1)]." *Id.* at \*28. The first three matters to which the CAVC referred are: (1) the information and evidence not of record that is necessary to substantiate the claim; (2) the information and evidence that VA will seek to provide; and (3) the information and evidence that the claimant is expected to provide. *Id.* at \*30. The fourth matter referred to by the CAVC is a request by VA that the claimant provide any evidence in his or her possession that pertains to the claim. *Id.* at \*30. The CAVC concluded that the request that the claimant provide any evidence pertaining to the matter at issue is a fourth element of the requisite notice. See *id.* at \*30 ("in compliance with the explicit requirement of § 3.159(b) and the implicit requirement of section 5103(a), on remand VA must 'also request that the claimant provide **any evidence** in the claimant's possession that pertains to the claim") (emphasis in original). Finding that VA failed to show that the absence of a pre-AOJ-decision notice was not prejudicial to the appellant, the CAVC vacated the Board decision and remanded the matter for compliance with what it considered the mandatory statutory and regulatory notice requirements of sections 5103(a) and 3.159(b)(1). *Id.* at \*28-29.

5. Although the CAVC found, in *Pelegrini*, that a request that a claimant provide VA with any evidence in his or her possession that pertains to the claim is an explicit requirement of 38 U.S.C. § 3.159(b) and an implicit requirement of section 5103(a), we conclude that the CAVC's finding in this regard is non-binding *obiter dictum*. "*Obiter dictum*" (often abbreviated as "*dictum*") is "[a] judicial comment made during the course of delivering a judicial opinion . . . that is unnecessary to the decision in the case and therefore not precedential." *Black's Law Dictionary* 1100 (7th ed. 1999). It includes a "remark made or opinion expressed by a judge, in his decision upon a cause, 'by the way'- that is, incidentally or collaterally, and not directly upon the question before the court." *Black's* at 1100 (quoting William M. Lile, et al., *Brief Making and the Use of Law Books* 304 (3d ed. 1914)). The United States Court of Appeals for the Federal Circuit has held that "[b]road language in an opinion, which language is unnecessary to the court's decision, cannot be considered binding authority." *Smith v. Orr*, 855 F.2d 1544, 1550 (Fed. Cir. 1988). *Dictum* in a court's opinion is not binding on lower courts or administrative bodies. See *In re McGrew*, 120 F.3d 1236, 1238 (Fed. Cir. 1997) (Board of Patent Appeals and Interferences

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reasonably declined to follow dictum from Federal Circuit opinion); *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (inferior court is free to reject dictum). Among the several reasons for this rule are the concerns that issues which are not necessary to a court's decision may not have been "refined by the fires of adversary presentation" and may not have been "as fully considered [by the court] as [they] would have been if [they] were essential to the outcome." *Crawley*, 837 F.2d at 292-93.

6. The issue regarding the content of the notice required under section 5103(a), specifically, whether a request that a claimant provide VA with any evidence in his or her possession that pertains to the claim is required implicitly by section 5103(a) or explicitly by section 3.159(b), was not raised or argued to the CAVC and was not necessary to that court's determination. Before the CAVC, Mr. Pelegrini challenged the Board's decision that "material" evidence had not been submitted and that his claim could not, therefore, be reopened, contending the Board erred in not notifying him beforehand that it intended to adjudicate his claim as a claim to reopen. *Pelegrini*, at \*7-8. Regarding section 5103(a), Mr. Pelegrini argued to the CAVC that the Board erred by failing altogether to give notice to him under 38 U.S.C. § 5103(a) of the evidence necessary to substantiate his claim and that his case should be remanded for VA to comply with the mandatory notice requirements in section 5103(a) and (b). *Pelegrini*, at \*8-9. Mr. Pelegrini also argued that he is entitled to "preadjudicatory" notice under section 5103(a). *Id.* at \*10. Mr. Pelegrini did not raise an issue or make any argument concerning the content of the notice as required by section 5103(a).

7. The CAVC's analysis and conclusion regarding the propriety of the Board's adjudication of the claim as a claim to reopen rather than as an original claim, *id.* at \*34-35, did not turn on the adequacy of any notice provided to Mr. Pelegrini. With respect to Mr. Pelegrini's contentions that VA failed to provide notice under section 5103(a), the CAVC's conclusions that the notice provisions of section 5103(a), as amended by the VCAA, apply to cases pending before VA at the time of the enactment of the VCAA on November 9, 2000, and that notice must precede an initial unfavorable decision by an AOJ provided the basis for the CAVC's order remanding the matter for compliance with the statutory and regulatory notice requirements. Those conclusions were not based on any analysis of the required content of the notice. It was unnecessary for the CAVC to reach the ancillary question of the specific content of the notice necessary to satisfy the requirements of section 5103(a), particularly when no notice had been provided to Mr. Pelegrini and the question was neither raised on appeal nor disputed by the parties. Accordingly, although the CAVC described as a holding its statement that a claimant must be given notice of particular things prior to an initial unfavorable decision by an AOJ, it is the requirement for giving of notice, rather than the content of the notice, that must be considered the holding of the court. The CAVC's additional observation that, "in compliance with the explicit

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requirement of § 3.159(b) and the implicit requirement of section 5103(a), on remand VA must 'also request that the claimant provide **any evidence** in the claimant's possession that pertains to the claim'" was mere *dictum* because it was unnecessary to resolve the appeal and "could have been deleted without seriously impairing the analytical foundations of the holding." *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986).

8. In addition to being unnecessary to the decision, the conclusion that VA must request that the claimant provide any evidence in the claimant's possession that pertains to the claim was reached without corresponding analysis regarding its legal basis other than a conclusory remark that such requirement is explicit in a regulation and implicit in a statute. The issue of the required content of the notice was not briefed by the parties, and the CAVC did not provide reasoned legal analysis of how the statute implies such a requirement or of how it provides authority for the regulation. See *Crawley*, 837 F.2d at 292 (noting that judicial statements concerning issues not contested by the parties and not essential to a court's disposition may not be as fully considered as they would be if they were essential to the outcome). It is in precisely such circumstances that the judiciary follows the doctrine that dictum is not binding in future cases. Because the CAVC's remark concerning the content of the notice required by 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b) was dictum, it is not binding precedent in that court and is not binding on VA in claim adjudications.

9. Turning to the merits of the issue addressed without analysis in the CAVC's dictum, section 5103(a) does not state a requirement to request "any evidence . . . that pertains to the claim," and the VCAA's legislative history does not indicate that Congress intended to impose on VA such a requirement. The statute only requires that VA notify a claimant who submits a substantially complete application of the information and evidence necessary to substantiate the claim and that VA indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, VA will attempt to obtain. It does not specifically require that VA request any evidence. Further, because it does not reference any evidence other than that necessary to substantiate the claim, it does not imply that VA should request any evidence pertaining to the claim other than that necessary to substantiate the claim.

10. The drafters of the statute were concerned that the notices sent to veterans often did not contain clear information to enable the veterans to understand what actions VA had taken or would take and what information or evidence they should provide. 146 Cong. Rec. H9,916-17 (daily ed. Oct. 17, 2000) (statement of Rep. Evans). The drafters were attempting to alleviate this concern, in part, by requiring the provision of enhanced notice to a claimant regarding information necessary to substantiate a claim. Explanatory Statement on H.R. 4864, As Amended, 146 Cong.

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Rec. H9,914. It was also intended that the notice provisions would ensure that veterans would be able to make informed decisions concerning their claims. 146 Cong. Rec. at H9,918 (statement of Rep. Filner). Notification of the particular information and evidence necessary to substantiate a claim and of which information and evidence the claimant is to provide will certainly ensure that claimants understand the actions they need to take and that claimants can make informed decisions concerning their claims. This notification undoubtedly fulfills the congressional mandate to provide enhanced notice. There is nothing in the legislative history indicating that Congress believed a general request to provide “any evidence . . . that pertains to the claim” would further enhance the notice or provide any additional information to help claimants understand what information or evidence they should provide.

11. Thus, there is no basis in either the terms of section 5103(a) or its legislative history on which to construe that statute as imposing, implicitly or otherwise, a requirement that VA request that a claimant provide the Department with any evidence in the claimant’s possession pertaining to a claim. The final-rule notice establishing section 3.159(b)(1) made clear that, “[i]f VA provides a clear and understandable notice to the claimant of what information and evidence is necessary to substantiate the claim, and what portion of that information and evidence VA will try to obtain, and what portion the claimant is required to provide, we believe we have satisfied our statutory duty.” 66 Fed. Reg. 45,620, 45,622 (2001). In our view, a regulation requiring that VA provide notice of (1) the information and evidence not of record that is necessary to substantiate the claim, (2) the information and evidence that VA will seek to obtain, and (3) the information and evidence that the claimant is expected to provide, as does section 3.159(b)(1), is all that is necessary to implement of section 5103(a). Consequently, assuming that the provision in the third sentence of 38 C.F.R. § 3.159(b)(1) concerning a request that a claimant provide “any evidence in the claimant’s possession that pertains to the claim” references an additional class of evidence to be sought beyond that identified by VA as necessary to substantiate the claim, the provision is not required by 38 U.S.C. § 5103(a), but rather was established under the Secretary of Veterans Affairs’ “authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department.” 38 U.S.C. § 501. Accordingly, VA is free to revise that provision to the extent it may find the provision unnecessary to the fair and accurate adjudication of claims. *Cf. Paralyzed Veterans of Am. v. Secretary of Veterans Affairs*, 345 F.3d 1334, 1348 (Fed. Cir. 2003) (finding “any evidence” provision reasonable, without finding it to be required).

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12. The notification provided pursuant to the first sentence of section 3.159(b)(1) concerning “any information and medical or lay evidence that is necessary to substantiate the claim” and the notification under the second sentence of that regulation as to which information and evidence the claimant is to provide should in most cases adequately inform the claimant of the particular evidence he or she needs to submit to substantiate the claim. Because the claimant will have been asked for all evidence necessary to substantiate the claim that the claimant is expected to provide, a generalized request for any other evidence pertaining to the claim may in many cases be superfluous and unlikely to lead to the submission of additional pertinent evidence. Therefore, it appears that the omission of a request for “any evidence in the claimant’s possession that pertains to the claim” in the notice provided to a claimant under section 5103(a) and section 3.159(b)(1) may often not be prejudicial to the claimant. VA may attempt to determine whether an error in providing notice to a claimant under section 3.159(b)(1) to submit any pertinent evidence in the claimant’s possession was harmful to the claimant. Where it can be concluded that, based on the particular facts and circumstances of the case, the omission of the request for “any evidence in the claimant’s possession that pertains to the claim” in the notice appears not to have harmed the claimant, such as where the claimant has stated that he or she has submitted all evidence in his or her possession pertinent to the claim, it would be legally proper to render a decision in the case without further notice under the regulation .

#### **HELD:**

Under 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1), the Department of Veterans Affairs (VA), upon receipt of a complete or substantially complete application, must notify the claimant of the information and evidence necessary to substantiate the claim for benefits and must indicate which portion of that information and evidence the claimant must provide and which portion VA will attempt to obtain for the claimant. In *Pelegri v. Principi*, No. 01-944, 2004 U.S. App. Vet. Claims LEXIS 11 (Jan. 13, 2004), the United States Court of Appeals for Veterans Claims (CAVC) stated that section 3.159(b)(1), explicitly, and section 5103(a), implicitly, require that VA request that the claimant provide any evidence in his or her possession that pertains to the claim. The CAVC’s statement that sections 5103(a) and 3.159(b)(1) require VA to include such a request as part of the notice provided to a claimant under those provisions is *obiter dictum* and is not binding on VA. Further, section 5103(a) does not require VA to seek evidence from a claimant other than that identified by VA as necessary to substantiate the claim.

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