**Department of Veterans Affairs**

# Memorandum

Date: July 16, 2004 VAOPGCPREC 7-2004

From: General Counsel (022)

Subj: *Pelegrini v. Principi*, No. 01-944, 2004 WL 1403714 (Vet. App. June 24, 2004)

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

**QUESTION PRESENTED:**

What did the United States Court of Appeals for Veterans Claims hold in *Pelegrini v. Principi*, No. 01-944, 2004 WL 1403714 (Vet. App. June 24, 2004), regarding the Department of Veterans Affairs' obligation to provide notice pursuant to 38 U.S.C. § 5103(a)?

**COMMENTS:**

1. On June 24, 2004, the United States Court of Appeals for Veterans Claims (CAVC) decided *Larry A. Pelegrini v. Anthony J. Principi, Secretary of Veterans Affairs*, No. 01-944, 2004 WL 1403714 (June 24, 2004). In April 1994, a Department of Veterans Affairs (VA) regional office (RO) denied Mr. Pelegrini's claim, based on exposure to herbicides during active service in Vietnam, for service connection for a soft-tissue mass in his lung. *Pelegrini*, 2004 WL 1403714, at *2. He did not appeal the 1994 decision, and it became final. *Id.* On June 9, 1994, VA amended 38 C.F.R. § 3.309(e) by adding respiratory cancers to the list of diseases for which a presumption of service connection is available for veterans exposed to an herbicide during active service. *Id.* at *10-*11. In March 1996, Mr. Pelegrini filed a claim to reopen. *Id.* at *2. In January 1997, the RO denied the claim on the merits. *Id.* Mr. Pelegrini appealed to the Board of Veterans' Appeals (Board), which issued an April 30, 2001, decision finding that the April 1994 RO decision was final and that no new and material evidence had been presented since that decision to reopen his previously disallowed claim. *Id.* Mr. Pelegrini appealed to the CAVC, contending that the Board erred by adjudicating his claim as a claim to reopen without first notifying him and allowing him to present evidence and argument on the issue and by failing to notify him of the information and evidence required to substantiate his claim as required by 38 U.S.C. § 5103(a). *Id.* After the CAVC issued an opinion in *Pelegrini* on January 13, 2004, VA filed a motion for panel reconsideration or for en banc review in the event that panel reconsideration were denied. *See id.* at 1. On June 24, 2004, the CAVC granted VA's motion for reconsideration, withdrew its first opinion in the case, and issued a new opinion in its place. *Id.*

2. Because in adjudicating similar cases VA is bound by the CAVC's holdings rendered in precedent decisions like *Pelegrini*, *Tobler v. Derwinski*, 2 Vet. App. 8, 12 (1991), it is important to accurately identify those holdings for VA personnel adjudicating claims. In *Pelegrini*, one holding is clear. The CAVC held that the Board improperly adjudicated Mr. Pelegrini's claim as a claim to reopen rather than as an original claim, an issue that the Secretary conceded at oral argument. *Pelegrini*, 2004 WL 1303714, at *3, *12. The CAVC held that, pursuant to *Spencer v. Brown*, 4 Vet. App. 283, 289 (1993), *aff'd*, 17 F.3d 368 (Fed. Cir. 1994), the Board should have adjudicated Mr. Pelegrini's claim as an original claim because VA's promulgation of the 1994 liberalizing regulation that added respiratory cancers to the list of presumptively service-connected diseases in 38 C.F.R. § 3.309(e) itself created a new factual basis for the claim. *Id.* at *11-*12. The CAVC described other statements in its opinion as "holdings," but the issues to which these "holdings" relate are not necessary to the disposition of the case based on *Spencer*, as the dissenting opinion explains. *Id.* at *14, *16 (Ivers, J., concurring in part and dissenting in part); *see Terry v. Principi*, 367 F.3d 1291, 1295 (Fed. Cir. 2004) (dictum is statement that is not essential to court's holding); *Co-Steel Raritan, Inc. v. International Trade Comm'n*, 357 F.3d 1294, 1307 (Fed. Cir. 2004); *Andrews v. Principi*, No. 98-1849, 2004 U.S. App. Vet. Claims LEXIS 383, at *29-*30 (June 29, 2004) (Steinberg, J., concurring in part and dissenting in part) (no need to address more general question when opinion fully and completely disposes of appellant's contention).

3. **Timing of VCAA Notice.** The CAVC held that 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1) apply to claims such as Mr. Pelegrini's, which was denied by VA before the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, was enacted on November 9, 2000, but remained pending before VA on that date. 2004 WL 1403714, at *5. The CAVC also held that sections 5103(a) and 3.159(b)(1) generally require VA to notify a service connection claimant of the information and evidence necessary to substantiate the claim before an agency of original jurisdiction (AOJ) initially decides the claim unfavorably. *Id.* at *6. However, the majority opinion also states that "we do not hold" that, if this notice was not provided because VA had decided a claim before November 9, 2000, the case must be returned to the AOJ for the adjudication to start anew as though no previous adjudication had occurred. *Id.* Rather, the majority opinion "specifically recognizes that, where, as here, that notice was not mandated at the time of the initial AOJ decision, the AOJ did not err in not providing such notice specifically complying with section 5103(a)/§ 3.159(b)(1) because an initial AOJ adjudication had already occurred." *Id.* at *6. Although the majority states that section 5103(a) applies to Mr. Pelegrini's claim because it was pending before VA on November 9, 2000, and that section 5103(a) requires that notice be provided before an initial unfavorable AOJ decision, the majority nonetheless concludes that VA's failure to provide the notice to Mr. Pelegrini prior to the initial unfavorable AOJ decision on his claim was not error. Thus, the majority opinion does not hold that VA must vitiate all AOJ decisions rendered prior to

November 9, 2000, denying service connection in claims that were still pending before VA on that date in order to provide VCAA notice and adjudicate the claims anew.

4. **Content of VCAA Notice.** The majority opinion in *Pelegrini* also considers the content of the notice required by 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1). The majority, in the course of its discussion regarding the timing of VCAA notice, rejected VA's contention that notice was provided to Mr. Pelegrini during a December 2000 Board hearing, because none of the transcript's pages cited by the Secretary "refers to or includes specific notice-complying language." *Pelegrini*, 2004 WL 1403714, at *6. The majority opinion also refers to "the notice deficiency" in this case, *id.* at *1, *7, *8, but does not identify that deficiency or explain which statutory or regulatory requirements were not satisfied by VA. Despite its stated reason for rejecting VA's argument regarding the Board transcript, the *Pelegrini* majority did not hold that, in order to comply with 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1), VA's notice must contain the "magic words" of the statute and regulation. *See United States v. Davis*, 261 F.3d 1, 45 n.40 (1st Cir. 2001) (plaintiff did not have to use "magic word 'declaratory judgment'" to put defendants on notice that its claims could be resolved with grant of declaratory relief); *United States v. Corrow*, 119 F.3d 796, 804 (10th Cir. 1997) (use of “precise words” of statute not required to put defendant on notice of criminal consequences of actions), *cert. denied*, 522 U.S. 1133 (1998); *Conlon v. Tennant*, 289 F.2d 881, 883 (D.C. Cir. 1961) (trial court and defendant apprised of "last clear chance" issue even though pretrial statement did not use the "precise words").

5. **Format of VCAA Notice.** The *Pelegrini* majority also did not hold that VCAA-complying notice can be provided only *qua* VCAA notice, *i.e.*, in a document provided to a claimant by VA and devoted solely to notifying the claimant of the information and evidence necessary to substantiate the claim, to indicating which party is responsible for obtaining which portion of such information and evidence, and to requesting that the claimant provide any evidence in the claimant's possession that pertains to the claim. The discussion of the Board hearing transcript in the majority opinion indicates that the notice requirement of section 5103(a) and section 3.159(b)(1) can be satisfied by a document such as a statement of the case, supplemental statement of the case, and rating decision or by a hearing on a claim as long as the document or hearing officer informs the claimant of the information and evidence necessary to substantiate the claim, indicates which party is responsible for obtaining which portion of such information and evidence, and requests that the claimant provide any evidence in the claimant's possession that pertains to the claim.

6. **Prejudicial Error.** The CAVC in *Pelegrini* also does not hold that VA's failure to comply with 38 U.S.C. § 5103(a) or 38 C.F.R. § 3.159(b)(1) per se constitutes prejudicial error pursuant to 38 U.S.C. § 7261(b)(2). *See Elings v. Commissioner of Internal Revenue*, 324 F.3d 1110, 1112-13 (9th Cir. 2003) (failure to include

date by which taxpayer may file petition with Tax Court did not invalidate IRS notice of deficiency when taxpayer suffered no prejudice). The majority opinion states that, on remand, the Board must ensure that Mr. Pelegrini is provided with notice that complies with the requirements of 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1) unless the Board makes findings regarding the completeness of the record or as to other facts that permit the CAVC to conclude that the notice error was harmless. *Pelegrini*, 2004 WL 1403714, at *7. The majority opinion instructs that, if the Board undertakes to make such findings, it must include "an enumeration of all evidence presently missing from the record that must be part of the record in order for [Mr. Pelegrini] to prevail on his claims." *Id.* Thus, if the CAVC remands a case because VA erred in providing notice pursuant to 38 U.S.C. § 5103(a) or 38 C.F.R. § 3.159(b)(1), VA need not provide complying notice on remand if the Board makes factual findings sufficient to support a conclusion that VA's error did not prejudice the claimant. [FN#1] For example, the Board could find that the record is complete or that a claimant conceded that he or she had no additional evidence or argument to submit. Several Federal circuit courts have held that a notice error is not prejudicial unless the appellant shows that the error prevented the appellant from submitting evidence or argument in support of the appellant's position. *See McMillan v. Jarvis*, 332 F.3d 244, 250 (4th Cir. 2003) (court's failure to notify pro se petitioner for habeas corpus relief that petition was subject to dismissal before court dismissed petition as untimely was harmless error in part because petitioner "does not point to any specific fact or argument that he was not able to present . . . and concedes he is not aware of any additional bases for avoiding the limitations bar"); *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 301-11 (5th Cir. 2002) (appellant did not identify material evidence it was unable to present because of lack of notice); *Herbert v. National Academy of Sciences*, 974 F.2d 192, 200 (D.C. Cir. 1992) ("Even if an error was made regarding the notice afforded [appellant], there is not an iota of evidence to intimate that [appellant] was prejudiced in any way by it: [appellant] suggests no argument or issue he would have raised if more notice had been provided. Moreover, appellant's counsel conceded in oral argument that the District Court accepted his supplemental filings after the hearing, . . . thereby providing him an ample opportunity to be heard. Without any prejudice to point to, appellant's notice claim must fall flat: our obligation to correct procedural errors in District Court does not extend to abstract or purely academic missteps.").

7. The fact that the CAVC did not hold in *Pelegrini* that VA's failure to comply with 38 U.S.C. § 5103(a) or 38 C.F.R. § 3.159(b)(1) per se constitutes prejudicial error pursuant to 38 U.S.C. § 7261(b)(2) is consistent with the court's case law that VA is not required to provide notice pursuant to 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159 in several other instances. In *Mason v. Principi*, 16 Vet. App. 129, 132 (2002), the CAVC rejected the claimant's contention that service during the 1980 Iran hostage situation constitutes wartime service for purposes of non-service-connected disability pension pursuant to 38 U.S.C. § 1521. The CAVC noted that there was no dispute as to the facts concerning the claimant's service

and held that the claimant did not serve on active duty during a "period of war" as defined by 38 U.S.C. § 101(11). *Mason*, 16 Vet. App. at 132. The CAVC further held that the VCAA was not applicable to the claim because the statute, and not the evidence, was dispositive of the claim. *Id.*; *see Kane v. Principi*, 17 Vet. App. 97, 103 (2002); *Manning v. Principi*, 16 Vet. App. 534, 542 (2002), *aff'd*, No. 03-7087 (Fed. Cir. Jan. 7, 2004); *Dela Cruz v. Principi*, 15 Vet. App. 143, 149 (2001); *Smith v. Gober*, 14 Vet. App. 227, 231-32 (2000) (VCAA does not affect issue of whether interest on past due benefits is payable pursuant to Federal statutes), *aff'd*, 281 F.3d 1384 (Fed. Cir.), *cert. denied*, 537 U.S. 821 (2002); *see also Wensch v. Principi*, 15 Vet. App. 362, 367-68 (2001) (factual evidentiary development is such that no reasonable possibility exists that further assistance could substantiate claim); *cf. Desbrow v. Principi*, 18 Vet. App. 30, 33 (2004) (any error regarding VA's application of VCAA is harmless because facts alleged by appellant could never satisfy requirements for earlier effective date); *Valiao v. Principi*, 17 Vet. App. 229, 232 (2003) (in DIC claim by veteran's brother, CAVC concluded, "[w]here the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision, the case should not be remanded for development [under the VCAA] that could not possibly change the outcome of the decision."). The CAVC has also held that the VCAA is not applicable to an individual who seeks revision of a prior final VA decision based upon clear and unmistakable error (CUE). *Livesay v. Principi*, 15 Vet. App. 165, 178-79 (2001) (allegation of CUE in a final decision is not a "claim" for benefits). In addition, the VA General Counsel has held that VA is not required to provide notice of the information and evidence necessary to substantiate a claim that cannot be substantiated because there is no legal basis for the claim or because undisputed facts render the claimant ineligible for the claimed benefit. VAOPGCPREC 5-2004.

8. **VA Entity to Provide VA Notice.** The CAVC also did not hold in *Pelegrini* that remand to the AOJ is required for VA to provide notice that complies with 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1). *Id.* at *7, *9. The majority opinion states that "[n]othing in § 3.159(b)(1) or section 5103(a) dictates which VA entity may provide the requisite notice to the appellant with respect to a claim remanded by the Court because of a lack of complying notice." *Id.* at *9. As explained above, the majority opinion indicates that, when a case is remanded by the CAVC for a notice error, the Board has the option to make the findings necessary to a determination as to whether the error was prejudicial to the appellant rather than ensuring that VA provides the content-complying notice. With regard to the question of whether the Board itself can provide content-complying notice pursuant to 38 U.S.C. § 5103(a), the *Pelegrini* majority made no conclusion but observed that the reasoning of *Disabled Am. Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339, 1342 (Fed. Cir. 2003), which invalidated 38 C.F.R. § 19.9(a)(2)(ii), appears to apply equally to the portion of the regulation that authorizes the Board to provide VCAA complying notice. *Pelegrini*, 2004 WL 1403714, at *9. As the dissenting opinion makes clear, the majority's observation on this point is pure dicta. *Pelegrini*, 2004 WL 1403714, at *15-*16 (Ivers, J.,

concurring in part and dissenting in part). In *Disabled Am. Veterans*, the United States Court of Appeals for the Federal Circuit invalidated 38 C.F.R. § 19.9(a)(2)(ii) because it allowed the Board to consider evidence not already considered by the AOJ and without having to obtain the appellant's waiver and because its allowing only 30 days to respond to section 5103(a) notice provided by the Board was inconsistent with 38 U.S.C. § 5103(b). 327 F.3d at 1342. The VA General Counsel held in VAOPGCPREC 1-2003, para. 14-15, that *Disabled Am. Veterans* does not prohibit the Board from sending the notice required by 38 U.S.C. § 5103(a), and if the Board were to provide notice, its actions would be consistent with the plain language of 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159. We believe that the analysis of *Disabled Am. Veterans* in VAOPGCPREC 1-2003 remains sound.

**HELD:**

The only holdings in *Pelegrini v. Principi*, No. 01-944, 2004 WL 1403714 (Vet. App. June 24, 2004), regarding the obligation of the Department of Veterans Affairs (VA) to provide notice pursuant to 38 U.S.C. § 5103(a) are the following:

1. Section 5103(a) of title 38, United States Code, and section 3.159(b)(1) of title 38, Code of Federal Regulations, generally require that a claimant for service connection be provided notice before an initial unfavorable decision by a VA agency of original jurisdiction (AOJ).

2. Section 5103(a) of title 38, United States Code, and 38 C.F.R. § 3.159(b)(1) apply to Mr. Pelegrini's claim, which the AOJ had denied before November 9, 2000, but which was still pending before VA on that date.

3. A VA AOJ did not err by not providing notice that complies with 38 U.S.C. § 5103(a) prior to the initial denial of Mr. Pelegrini's claim before the date on which the statute was enacted.

4. If the United States Court of Appeals for Veterans Claims (CAVC) remands a case for VA to provide notice consistent with 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1) (notice that informs the claimant of any information and evidence not of record that is necessary to substantiate the claim, indicates which party is responsible for obtaining which portion of such evidence, and requests that the claimant provide any evidence in the claimant's possession that pertains to the claim), the Board must ensure that complying notice is provided unless the Board makes findings regarding the completeness of the record or as to other facts that would permit the CAVC to conclude that the notice error was harmless, including an enumeration of all evidence now missing from the record that must be part of the record for the claimant to prevail on the claim.

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[1] In *Pelegrini*, the CAVC specifically gave the Board the option of either ensuring that proper notice is given or making factual findings sufficient to permit the CAVC to conclude that the notice error was harmless. In applying the *Pelegrini* holding to similar cases, the Board should carefully consider the CAVC's remand instructions and remain mindful of *Stegall v. West*, 11 Vet. App. 268, 271 (1998) (VA is obligated to ensure compliance with CAVC remands).