IN THE SUPREME COURT OF THE UNITED STATES

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JAMES B. PEAKE, SECRETARY :

OF VETERANS AFFAIRS, :

Petitioner :

v. : No. 07-1209

WOODROW F. SANDERS. :

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Washington, D.C.

Monday, December 8, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

ERIC D. MILLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

CHRISTOPHER J. MEADE, ESQ., New York, N.Y.; on behalf of the Respondent Simmons.

MARK R. LIPPMAN, ESQ., La Jolla, Cal; on behalf of the Respondent Sanders.

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-1209, Peake v. Sanders et al.

Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER

ON BEHALF OF THE PETITIONER

MR. MILLER: Mr. Chief Justice, and may it please the Court.

Congress has directed the Veterans Court to take due account of the rule of prejudicial error in reviewing administrative determinations of veterans benefits. For four reasons, the court of appeals erred in holding that the Veterans Court should presume the existence of prejudice whenever it finds that the VA has erred in providing notice to the claimant.

First, section 7261, the Veterans Court prejudicial errors statute, is in language that is essentially identical to that of the APA's prejudicial error provision. And when Congress adopted that language in 1988, it was understood to place upon the party challenging an agency's action the burden of showing that any error was prejudicial.

Second, a notice error of the kind at issue

here does not --

JUSTICE SCALIA: Why do you say that? That it was understood so? Because of the Attorney General's commentary on that?

MR. MILLER: The principal reason that it was understood is because the uniform practice in the courts of appeals as of 1988 was to place upon challengers to agency action the burden of showing prejudice from the error. And the Congress was well aware of that, and in particular the Senate Veterans Affairs Committee was cited in the Ninth Circuit's decision in Seine & Line Fishermen's Union.

CHIEF JUSTICE ROBERTS: You basically have four cases in the courts of appeals to support that proposition, right?

MR. MILLER: Well, Your Honor, it's considerably more than that. And the only cases that could even suggest any support to the contrary rule are in the very different context of notice and comment rulemaking under section 553.

And the reason that that's different is really for two reasons. That is that the -- the interest that section 553 is intended to protect is not the interest of any particular commenter or particular outcome of the rulemaking. It's the interest of the

public in having the agency's decisionmaking fully informed by all of the relevant comments.

CHIEF JUSTICE ROBERTS: Well, but this is -- I mean, it's kind of the -- it's the first notice. It gets the ball rolling. I think it's like, you know, two teams and you don't tell one of the teams when the game starts and then you say, well, it doesn't matter because they would have lost anyway, there is no prejudice.

MR. MILLER: The reason that in a great many cases there is not going to be prejudicial error of the kind at issue here is that the VA has an informal non-adversarial system and many opportunities to correct the effect of any official notice error. That is illustrated by the history of the cases. To take the Ms. Simmons's case, for example --

JUSTICE GINSBURG: Can we go back to the question that was just posed? We have never held that every agency -- agencies come in many sizes and shapes, but in all cases, the APA places the burden on the -- on the petitioner. But this Court has never held that across the board, no matter what agency we are talking about, that's the rule.

MR. MILLER: That's correct. This Court has not held that. But Congress was aware that the uniform practice, certainly in agency adjudications in the

courts of appeals, was to place the burden on the challenger, and Congress --

JUSTICE STEVENS: Was Congress aware of this when the Administrative Procedure Act was passed, you mean?

MR. MILLER: No, the statute at issue here is the Veterans Judicial Review Act of 1988. So the relevant time we are looking at what the practice was is as of 1988 when Congress incorporated the language from the APA and placed it into section 7261. And as of 1988, it was clear that the burden was on the challengers.

JUSTICE ALITO: Can I ask you to clarify exactly what you mean by the "burden" of showing prejudice? Is it correct that neither of the following -- to borrow the terminology that you would use in formal litigation, and I understand this is not formal litigation before an agency, but to borrow that terminology, is it correct that the issue here doesn't concern either the burden of production or the risk of nonpersuasion before the administrative agency? Before the regional office? In other words, if there's -- if there is evidence that the veteran as opposed to the VA has to produce, that doesn't change, and whatever the standard is that has to be met to show an entitlement to

benefits, that doesn't change either, so that all that's involved here is whether -- whatever showing needs to be made is to be made on appeal or on remand?

MR. MILLER: That's correct. If we are talking about what showing needs to be made on appeal. And as this Court suggested in O'Neal, you know, the burden language is perhaps more appropriate for the context where there's people presenting competing evidentiary submissions to a factfinder and that's not what we have here.

JUSTICE BREYER: That's in O'Neal. It says that, but most of the court joined and the reason it says it is it just confuses everybody, at least me, to talk about "burden" in this context. I think if O'Neal is right, it says what this is, is not involving a jury, not involving -- it's just what Justice Alito says, and following that, what you have, you say to the judge, "Judge, your job is to decide this. Decide. Decide whether you think that the one side -- whether there is error or whether the error is harmless or whether it isn't. Decide it."

Now, it could be in a rare instance the judge just can't decide. He's in grave doubt. And so what we are talking about is what to do in that -- what should be a very, very rare instance.

Now, when I read this case, I thought the Veterans Affairs is absolutely common sense on this. It says, well, when you really don't know what to do, Judge, if the veteran got no notice at all, then probably the error was harmful. But if he got the basic notice, and all that's at issue is who should produce what or whether he thinks that he didn't know that he's supposed to produce a lot of information, well, there, it would be pretty rare that it was harmful. So then you'd better say to him, veteran, why did this hurt you?

That's all common sense, and it seemed to me that that's what the Veterans Court was saying and then the Federal Circuit unfortunately, like I might have done, too, got it all mixed up with this burden of proof language. Now, you tell me, legally is that result which I am talking about sensible, and if so, how do I get there legally?

MR. MILLER: Justice Breyer, the reason that we have used the language of "burden" --

JUSTICE BREYER: I'm not criticizing you for that. I'm not -- it's not a criticism. I'm just really trying to figure out to get to what I see as common sense legally.

MR. MILLER: The point that we are trying to emphasize is that, in the ordinary course the Veterans

Court, like any court, is going to act on the basis of arguments that are presented to it by the parties. So when you speak of the "burden," you mean the challenger has the obligation, if it wants the Veterans Court to find prejudice -- to articulate some theory of how there was prejudice. And that --

JUSTICE BREYER: The theory is he didn't know anything about this, got no notice whatsoever, so he didn't know that he's supposed to produce more information or he'll lose. That's the theory.

MR. MILLER: But in order to -- in order to connect that error -- I mean, that's an identification of an error under the Veterans Claims Assistance Act. But if you connect error --

JUSTICE BREYER: But if you connect it by saying normally a veteran who isn't that knowledgeable -- not everybody is a genius in law -- when he doesn't get a notice that tells him you got to produce something more or you lose, he might forget to produce something more. That's the theory.

MR. MILLER: If he has something more. And what we are saying is that in order to get a remand, the claimant, by the time they get to the Veterans Court, has already identified the error, has made an argument to explain to the court that there was in fact an error,

at that point they ought to explain how the error affected them. If it prevented them from put in a piece of evidence, they ought to tell the court, "Here's the piece of evidence that I want to put in."

CHIEF JUSTICE ROBERTS: Well, usually, when you have an appellate court, with a hard question, is easily divided, the case is resolved on the basis of the standard of review. What is the presumption, if it's a close case? And why isn't that all sort of what we are talking about here? It's a close case, and the judge -- the panel says, well, this side has the burden of persuasion, so we're going to come out the other way.

MR. MILLER: Because I think in a case where the -- like these, where plaintiff has not identified anything that they would have done differently, it isn't a close case with respect to the question.

Now, we have to be clear: If a claimant can articulate something they would have done differently, we are not saying they have the obligation of showing that the outcome definitely would have been different or more likely than not, it would have been different. It would be sufficient to identify what they would have done differently.

CHIEF JUSTICE ROBERTS: Well, what if what they would have done differently is get different

medical tests, or done something like that, or have the doctor in the prior testing who prepared the diagnosis look at something that they didn't have them look at before? In other words, it's not simply the absence of documents that they know they can submit or could have submitted. It's that type of question where nobody knows. I mean, you don't know what would have happened if they had the doctor look at the issue that now turns out to be critical, but if they had gotten the right notice they might have had time to do that.

MR. MILLER: Well, depending on the state of the record in a particular case, that might be sufficient to show a reasonable probability that the outcome would have been different. But in a lot of cases it won't be, and I think Simmons's case is a good example of that.

JUSTICE GINSBURG: But if the government has the obligation at the very first to tell the veteran what the veteran must produce to substantiate the claim and the government doesn't do that, why shouldn't it be the responsibility of the government to say to the court, "this is what, if we had done what we were supposed to do, this is what we would have included in our notice." And looking at that, the court can tell whether there's anything the veteran might have done.

But why shouldn't the government at least have the obligation to say what it would have done had it complied with the statute, what it would have said specifically in this case?

MR. MILLER: Well, I mean, how does the government comply, to take Simmons's case as an example, when the VA sent her the notice letter, her claim was for an increased rating. She had a hearing loss that had already been determined to be service-connected, but was not sufficiently severe to be compensable, and she said: My hearing has gotten worse and it now is severely worse to be a compensable disability. The notice letter that was sent to her, which is on page 43 of the joint appendix, was incorrect and simply described the general requirements for establishing a service connection. It didn't specifically say to make out an increased rating claim you have to show that your hearing has become worse.

But as soon as she got a decision from the regional office, which is the first decisionmaker in the VA system, she was told that the reason her claim had been denied was because her hearing loss was not sufficiently severe. And there's a mechanical application of the certain number of decibels in each ear yields a certain disability rating, and the notice

that she got from the regional office explained all of that and cited the regulation that we produced in the tables.

So at that point she was aware of why her claim had been denied and what was missing, namely, evidence that her hearing had become worse. And she had been given at that point a series of hearing examinations -- examinations for hearing by VA doctors and the results of those were all reproduced in the decision that she got. And yet, the Veterans Court found that the government had failed to carry its burden of showing a lack of prejudice, because we couldn't show as a matter of law that there was no way she could obtain --

JUSTICE BREYER: Which is fine. If I get that record and if it is the way you describe, I'm not in grave doubt. No problem. The record's the way you described it, she knew everything she was supposed to know, so there's no harmful error, okay? We are only talking about cases where there is real doubt in the judge's mind about whether this failure of the agency did or did not hurt the woman or man. Now, when in doubt, we have the Veterans Court telling us the best way to administer this stuff is when they get no notice at all, and you are really in doubt, judge, you don't

know if it was harmful or not, here's what you do: Assume it was harmful. They're the ones who know. I don't know.

MR. MILLER: With respect, Your Honor, I don't think that's a fair description of the effect of the rule adopted by the court below.

JUSTICE BREYER: Suppose then we look at our rule, we read the first paragraph, what this court said, and we all held it, and therefore, we say, those are the cases we're talking about, where you are in doubt, and when you are in doubt, go proceed as the Veterans Court told you in terms of who has to show what.

MR. MILLER: I think this case is a good illustration about why that sort of grave doubt you are describing doesn't arise in a case like this, where at no state in the proceedings has the claimant offered anything that they would have done any differently. If they can't say, you know, here's what would have happened differently, than there really isn't any doubt what will happen on the remand, because if on the remand if they don't do anything different then the result is not going to be any different.

JUSTICE STEVENS: Maybe I am not following this as I should, but it seems to me you are suggesting that there is no error.

MR. MILLER: No, certainly there was an error. There was an error.

JUSTICE STEVENS: What was the error?

MR. MILLER: The error was that the initial letter that was sent to her describing what the evidence needed to -- that she needed to submit in order to establish her claim, misidentified that evidence; that it described the elements of general claim for service connectiveness, didn't specifically explain what was needed just an increased rating claim.

JUSTICE STEVENS: Are you saying that error was not prejudicial because the earlier information she received gave her what she needed?

MR. MILLER: The principal reason why that error was not prejudicial is because the only way she could have received benefits for an increased rating claim was evidence that her hearing had become worse. And she had a VA hearing test that said her hearing did not meet the schedule A criteria for being compensable damages.

JUSTICE STEVENS: Why wasn't that statement you just made sufficient to discharge the burden of showing no prejudice?

MR. MILLER: The fact -- I -- we believe it shouldn't, then. But under the rule as imposed by the

courts below, it clearly wasn't.

Under the decision of the Federal Circuit, the VA has the burden of showing that there was no way that benefits could have been awarded as a matter of law. And that had been in effect prior to the VA proving negative by demonstrating the non-existence of any evidence anywhere that might have been material to the claim.

CHIEF JUSTICE ROBERTS: You know -- it's easy to look back and view this in the abstract legal terms, but we are dealing with lay people who are trying to get something from the government, which is always a difficult thing. And you have one notice saying you have got to show that this was during the service, then they get another notice or decision saying it wasn't severe enough. Why is it so difficult, when the government made a mistake in dealing with this layperson who is just trying to get benefits to which they are entitled, to say that the government has to show that it didn't make any difference, rather than requiring the layperson to do that?

MR. MILLER: Well, because there are two responses. The first is that it's important to keep in mind the stage of the proceedings which this inquiry involved. The prejudicial inquiry is only at issue once

the claimant has reached the Veterans Court, which is an adversary proceeding in which claimants do have counsel, and they identified an error and they have explained to the court: Here's what the error was. So that's the stage in which it would be incumbent upon them to articulate how the error might have affected them.

The other point to be made is under the rule of the court of appeals it's going to be very, very difficult in many cases for the government to discharge the burden of showing there is no evidence that could have possibly been produced. And the result is a large number of remands.

JUSTICE KENNEDY: And as between the two courts, the court of appeals, the Veterans Court and the Court of Appeals for the Federal Circuit, do we owe either of them, maybe not deference in the Chevron sense, but some deference because of their expertise in dealing with these claims, and if that is so then do we owe more deference to the court of appeals or the Veterans Court?

THE WITNESS: I'm not aware that this Court has ever --

JUSTICE KENNEDY: I mean it's an issue of law, so I take it it's de novo.

MR. MILLER: It's certainly that.

JUSTICE KENNEDY: But in the exercise of that review, don't we have to give some weight to the determination of the Court of Appeals for Veterans Claims that sees these claims all the time? I actually thought that that's where you were going to start out because you cited 7261, which says that the Court of Appeals for the Federal Claims shall, what, give due effect to -- take due account of the rule of prejudicial error. And I think you could get from that that they have a certain amount of latitude in determining what the best rule is. But you're not going to -- you don't tell us that?

MR. MILLER: No, and I think that by adopting language from the APA using the same language that applies to all kinds of judicial review of agency actions, Congress strongly suggested that it didn't want a unique rule for judicial review of VA determinations. And so I think there is no reason to defer to either the Veterans Court or the Federal Circuit on this general question of the standard of prejudicial review.

JUSTICE STEVENS: May I ask a factual question. You said most of these people were represented by counsel. There used to be a rule that they could only be paid ten dollars a case. Is that still in effect?

MR. MILLER: When I said they were represented by counsel, I meant in the Court of appeals for Veterans Claims, not at the administrative --

JUSTICE STEVENS: But not during the nisi prius proceeding.

MR. MILLER: In the administrative proceeding the restrictions on payment of counsel have now been relaxed at the Court of Veterans Appeals stage. So there generally -- there is not counsel at the regional office, but once the case reaches the board there can be counsel.

JUSTICE STEVENS: There can be counsel. But is it really typical?

MR. MILLER: I don't know the statistics on that, because --

JUSTICE STEVENS: There would be a dramatic change, because years ago I remember a case in which the Court upheld a ten-dollar fee limit on the notion that these people didn't need lawyers at all, which struck me as a little strange.

MR. MILLER: In any event, that is no longer the case at the board level, and even those claimants who do not have counsel, the great majority of them, I think about three-quarters at the regional office level and 98 percent at the board level are represented by

some sort of non-attorney representative, either service organizations like the American Legion, or many States have organizations that assist claimants. Like Ms. Simmons, for example, was represented by a North Carolina State agency before the VA. So there is some assistance to claimants there.

JUSTICE SOUTER: Mr. Miller, could you help me out on how the system works in practice in a different way? One of your answers a few moments ago was that when -- I think it was Ms. Simmons was told why she lost, she in effect got as much notice as she would have needed to have to in effect do better on a remand. My first question is: Is there an automatic right to a remand?

MR. MILLER: If you are talking about after the initial decision from the regional office, there is not an automatic right to a remand, but there is an automatic right to a de novo review by a more senior official at the regional office.

JUSTICE SOUTER: With new evidence?

MR. MILLER: Yes. You can get a hearing. You can present new evidence. It's a decision review officer. And then if you are still dissatisfied with the resolution after that, you can go to the board, and you can get a hearing before the board. The board's

review is de novo.

JUSTICE SOUTER: Okay. But even on the -- on the functioning of the system as you have explained it, at the -- at the very least the person says -- let's assume Simmons says: Oh, now I understand and I will get the following piece of evidence, which I didn't realize was my responsibility.

Even on that explanation, it means that the claimant is going to have to go through another stage in the administrative litigation process.

So I assume that ought to count as some sort of prejudice, and I assume it's something that, as it were, the burden of championing the VA ought to bear rather than the claimant.

MR. MILLER: Well, I guess to the extent that the delay in adjudicating the claim is a kind of prejudice, it's not a prejudice that would in any sense be cured by a remand for further proceedings, which will just result in further delay.

JUSTICE ALITO: If the -- I'm sorry. I didn't mean to interrupt.

MR. MILLER: I would just add that the -- the effective date of the claim, which is the date as of which benefits are awarded, is the date the claim was filed, so you wouldn't be losing money when you --

except for the --

JUSTICE SOUTER: No, but you are going to have to go through another stage of litigation. One of the functions of the burden rule, and it might be too subtle a function to worry much about, but one of the functions is to puts the party with the burden on -- on notice that if you fail in your obligation, you're the one who is going to have to pay, unless you can convince everybody that there was in fact no harm done by this. And this induces the party with the burden to do what the primary obligation says the party ought to do.

And on your -- and on your analysis, since the government would not have that obligation, the government has less of an inducement to follow the statutory obligation.

MR. MILLER: But the government has a very strong inducement to follow the statutory obligation. Like every agency -- -

JUSTICE SOUTER: Well, it may have a strong inducement, but I'm talking about a stronger one. If the government knows that it is going to bear the burden of any doubt about the significance of its failure, to some extent I suppose that is going to induce the government to be on its toes.

MR. MILLER: Well, I suppose that is right,

but I think in a lot of cases -- the VA in all cases strives conscientiously to comply with its statutory obligations. The notice requirements as described in section 5103 are fairly vague. They -- the notice has to be tailored, at least to some extent, to the nature of the claim that's presented. And every time that the Veterans Court or the Federal Circuit elaborates on exactly what kind of notice is required, to the extent that the VA wasn't aware of that elaboration before, there are going to have to be remands in all those pending cases.

JUSTICE SOUTER: Well, I mean that's the essential problem with common law adjudication. And there is not much we can do about that.

MR. MILLER: But it's a problem that is particularly acute here, given the volume of claims that the VA has.

JUSTICE GINSBURG: What is the experience? When the case is remanded, it goes back to the -- does it go back to the regional? Suppose the -- the veteran is now given an opportunity to present whatever additional substantiation.

MR. MILLER: The claim, when remanded from the Court of appeals for Veterans Claims, goes back to the board. In most instances the board would then send

it back to the regional office for further development.

If I could reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Miller.

Mr. Meade.

ORAL ARGUMENT OF CHRISTOPHER J. MEADE

ON BEHALF OF RESPONDENT SIMMONS

MR. MEADE: Mr. Chief Justice, and may it please the Court:

I would like to make three points. First, because notice is integral to the system that Congress designed, the VA's failure to provide notice is likely to prejudice the veteran.

Second, it would be difficult for the veteran and comparatively easy for the government to carry a burden. It would be difficult for the veteran because under the government's rule the veteran would need to engage in a speculative exercise, identifying what evidence would have been developed had the veteran been notified and had he received the full assistance of the agency.

JUSTICE ALITO: Why is it a speculative enterprise? If you are correct, and the proper resolution in a case like this is a remand, let's say all the way back to the regional office, and if before

the regional office it's the veteran who will need to come forward with some evidence supporting the claim, why does it make sense to remand the case to the regional office if there is no possibility that when the case gets back there the veteran can come forward with medical evidence that's needed?

MR. MEADE: Two reasons, Justice Alito: First, it's not clear even in the Veterans Court that the veteran will have notice of what's required, a point I would like to address.

But, second, if it's remanded, the process will develop as it should have in the first place, because under the statutory scheme there is both the VA and the veteran, the informed veteran, who have joint duties and together during an interactive process they develop the evidence together. And during this interactive process, to answer to Justice Stevens's question, the veteran is prohibited from hiring a lawyer. Without having the most basic notice of what's required, the veteran cannot participate in this process. And the only way we can know how the process would really work would be to give the veteran the notice that he was entitled to in the first place and then allow the process to unfold as it should have.

JUSTICE ALITO: What if you have the

situation -- and I think actually your co-Respondent's case illustrates this better than yours. But you have a situation where the record as it has developed contains some evidence that supports the veteran's position and some evidence that supports the position in favor of denial of benefits. The Veterans Administration all the way up through the process finds that the evidence contrary to the veteran's position is much stronger and denies the claim on that basis. The veteran says: I didn't get notice of what exactly I needed to prove.

Now, if on remand to the regional office it's still going to be up to the veteran to come forward with medical evidence showing hearing loss or vision -- connecting the vision loss to something that happened in the service, why does it make sense to send it back if there's no possibility that the veteran is going to be able to do that when the case gets back?

MR. MEADE: Well, the answer is, first of all, that we don't know how the process would unfold once the veteran has notice. Even if there is evidence in the record, we don't know what evidence would have been developed had the veteran had proper notice.

In addition, veterans often are not --

JUSTICE SCALIA: Excuse me. Why is that? I'm not sure I follow you on that point. Once he's got

up to the next level and finds what the notice should have told him, why can't he come up with it then?

MR. MEADE: Well, for a few reasons. First of all --

JUSTICE SCALIA: You say it's a de novo, right, at this next level?

MR. MEADE: First of all, it's unclear whether the veteran would even have notice even at that point. None of the other requirements that the agency's is required to give are the same as the notice requirement. However, if in appropriate cases they have given the actual notice by the time it reaches the Veterans Court, they can use that to rebut the prejudice. And that's what the Veterans Court said in Vasquez-Flores.

JUSTICE KENNEDY: In your case did your client attend the initial hearing?

MR. MEADE: There was a medical examination that she didn't attend. There was a question of where the notice was sent, and this is at 70a of the Petitioner's appendix. There was confusion. Apparently, notice was sent to the wrong address by the agency.

JUSTICE KENNEDY: Well, what's the first time that your client knew that this claim was going to

be processed at a particular time or the first time your client knew it had been denied? I just was never clear on the fact of what happened. If the notice was lost in the mail, so how did she know there was a hearing at all, or did she?

MR. MEADE: She later informed the agency that she had changed her address. But even it appears that further notices were sent to the wrong address.

JUSTICE KENNEDY: I'm just trying to -- it seems to me at the first hearing, if she in fact is there, they say, well, now you have to give us some notice. And then at that point -- or some documentation, and at that point, at the initial hearing, everybody knows who has to produce what.

MR. MEADE: But there is not necessarily a hearing. It was a medical examination that was supposed to be scheduled that she didn't attend, partly because of confusion of where the notice was sent.

JUSTICE KENNEDY: Is there usually an initial hearing?

MR. MEADE: No. There's only a hearing if the veteran requests it.

JUSTICE KENNEDY: Okay.

MR. MEADE: There is no hearing unless the veteran requests it. So here we have a situation where

the veteran did not know what she needed to provide. She has two sets of claims, one for her left ear and one for her right ear. Neither claim was intuitive. And she couldn't figure out what she needed to do without he notice --

JUSTICE BREYER: And so, why not just say that? What's the big problem of saying, judge, and then you say just what you said? And then the judge again won't be in doubt any more. So there's no need for this case because, either -- either -- either the veteran's agency will say, look, I walked that veteran through the process, I walked him through the process, walking him through the process he was told everything he needed to know, and there is no real problem here. It's just a formality that he didn't get the notice. And if that's true, I'm not in any doubt, unless the veteran tells me that that's wrong, and here was something, okay?

On the other hand, we have your case. Your case, she didn't go to the doctor. If she went to the doctor, maybe she would have found something out.

Again, I have no doubt, there is harmful error. So this case is a theoretical law professor's case that is never going to come up, because there is never any doubt. Either the VA did walk him through it and it's no deal -- big deal, because she can't come up

with anything, or she can come up with something.

MR. MEADE: I agree that burdens only matter in a handful of cases, but it makes sense to put the burden on the government for a number of reasons.

JUSTICE BREYER: It certainly does because it makes sense to tell the government: Government, you have to come up with every possible conceivable factual scenario and prove there wasn't a man from Mars who came in, and -- you know, that doesn't make sense.

MR. MEADE: But that's not what we ask for here. First of all, if the veteran actually received notice during this dialogue that the government describes, then the government can point to that as a way to disprove prejudice.

Second of all, veterans are often vulnerable. They are often unrepresented in the Veterans Court. Under the latest statistics, 64 percent are unrepresented at the beginning of the Veterans Court, 24 percent at the conclusion of the Veterans Court. Many have psychological and mental disabilities like post-traumatic stress disorder. Twelve percent of those who currently receive disabilities receive benefits for PTSD.

And it's not clear -- this is not lawyers; this is not doctors trying to receive benefits. This is

not just lay people. They are veterans who served the country --

JUSTICE BREYER: I know all this and why don't you just tell the judge that and say: Look at my client, judge, look at my client. My client obviously isn't going to understand what to do unless the client is told. And here my client wasn't told.

I'm the judge, I'm not in any doubt, you're going to win, okay?

So what I can't figure out is how to deal with this case, which as I said strikes me as a law professor's case that shouldn't make any difference in any real situation.

MR. MEADE: The reason is that it's helpful to have presumptions to deal with the typical case where we have in our case a first element notice error. The question where the veteran does not even know what evidence he needs to put forward, in that case it makes sense because of the high likelihood of prejudice to have a general rule that the burden should be on the government and not on the veteran.

CHIEF JUSTICE ROBERTS: No court is going to accept as a showing of prejudice the idea that, here, look at my client as a layperson who didn't know what to do. That's not going to be adequate, is it?

MR. MEADE: I don't think it would be. That's why it makes sense to have a general presumption. In cases where the government can either show that the process worked as it should have or that the veteran actually received notice during the process, it can rebut that prejudice.

In fact, in 2008 alone, the government has been able to do so. And it has done so at least a dozen times in a number of cases, rebutting the burden of prejudice that was established by the Veterans Court.

CHIEF JUSTICE ROBERTS: What's wrong with Mr. Miller's response that at the very first level of review, you can start all over; and at that point you know precisely why your claim was denied?

MR. MEADE: Well, again, there are various levels of review. But the notice to start that first level of appellate review does not necessarily give the veteran the notice that she is entitled to.

CHIEF JUSTICE ROBERTS: That was my question. Is it -- is it -- I take it it's more than just a stamp saying "denied," right? There is some explanation in every case?

MR. MEADE: Exactly. There is a statutory requirement that a statement of reasons needs to be provided, but the statement of reasons don't necessarily

correlate with the detailed requirements under the notice statute. Under Vasquez-Flores what the Veterans Court said was that the notice needs to be quite detailed and the denial letter in a particular case might not map on to those particular requirements.

In October of this year, Congress went farther and said: We want these notice letters to be even more detailed. We want to give the veterans more notice, which shows that the Congress is concerned about these notice letters and wants to make it clear to the veteran what is required.

Let me answer a point that Justice Alito raised before. We are not asking here for a presumption of benefits. All we are asking for is a remand so that the veteran can get notice and have the process proceed as it was meant to in the original circumstance.

JUSTICE GINSBURG: Does the -- the notice can be given -- skipped entirely, as it was in Simmons case, or notice could be given but it's defective. It can be defective in a major way, it can leave out -- you said Congress recently required a more detailed notice. Do we treat all those like, as long as the notice doesn't measure up fully to their statutory requirement, then the veteran goes back to square one? And so, you wouldn't make any distinction between whether the notice

was not given at all, and the case where the notice was given, but it was incomplete?

MR. MEADE: The question of whether the notice is okay or not, is a question for the Veterans Court, a factual finding.

Generally, though, I would agree with you that either no notice or incomplete notice are the same and would trigger a first notice error. There would be cases, I suspect, where the notice was erroneous, but only on a technical ground, that the Veterans Court would not think of as being a first level notice error.

One final point I would like to make, Your Honor, is that in passing the statute Congress made it clear that it wanted to assist all veterans, including those whose claims did not appear meritorious on their face, and it did so by overruling the decision in Morton v. West in the Veterans Court.

That case has said that a veteran needs to meet a certain minimal threshold before receiving VA's assistance, that first the veteran needs to show that the claim is well grounded. Congress rejected that in passing the statute and said: Congress wants to help all veterans, including those whose claims don't seem meritorious on the face and including those who can't make a threshold requirement. And Congress specifically

rejected the policy rationale of the Veterans Court and said that they want -- Congress wants to use resources to help all veterans, including those whose claims are not meritorious on its face.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Meade.

Mr. Lippman.

ORAL ARGUMENT OF MARK R. LIPPMAN

ON BEHALF OF THE RESPONDENT SANDERS

MR. LIPPMAN: Thank you. Mr. Chief Justice, and may it please the Court:

Justice Br eyer, I would like to address one of the observations you made applying O'Neal and Kotteakos and the "grave doubt" standard.

The problem here is that those standards assume a fully developed record. That's why it's not a perfect fit here because the very notice failure, the defective notice, prevents a fully developed record.

JUSTICE BREYER: Well, it seems -- what I was trying to get to, which I don't see how to quite get there -- it seems to me that if something really went wrong, if there -- there's no notice, that "veteran, you have to put in some material, or you are going to lose," if there is no notice of that, and he really

didn't get any notice during all this cooperative process, then I think the Veteran's Court is right. At that point I think it's fair to assume that he's hurt.

But if he got the notice -- and there'll be a few cases where he had nothing to produce, but a lot of them he would have had something to produce. They know it, we don't know. The Veteran's Court knows. Now the other three matters -- who is supposed to produce what, and do you have general knowledge, can you produce whatever you want -- I would think it would be very rare that a veteran was hurt, if he knows the first, by not knowing the second, third and fourth.

And therefore, I think he better come forth to explain in the brief, in the brief, why this matters. Now, that's what it seemed to me the Veterans Court set up. They know about it. They set that up. It's common sense. So, how do I get to a legal result that says just that? Or can I or should I?

MR. LIPPMAN: I don't think you should, and if my case could be used as an example --

JUSTICE GINSBURG: Your case is one where the veteran did get what they call the first level notice.

MR. LIPPMAN: Correct.

JUSTICE GINSBURG: So Justice -- the

implication of Justice Breyer's question is that your client would lose, because your client did get the first level notice and you say that that's not good enough.

MR. LIPPMAN: That's correct. He did not get the second or third level of notices; that is, what the government said it will get and what he was required to get.

This is the letter or part of the letter, critical part of the letter he got. It says: "We are making reasonable efforts to help you get private records or evidence necessary to support your claim." So he had every reason to assume that the -- that the VA would get the evidence that was necessary.

JUSTICE ALITO: Why doesn't this make sense in your case? I think this illustrates what is troubling to me about the Federal Circuit's decision, but maybe I am missing the point.

Your client was denied benefits for failure to show a causal connection, to show that his vision loss is service-related. He provided evidence from two private ophthalmologists or optometrists providing very weak causes of -- evidence of causation. One said it was not inconceivable that this was the cause of it. He was examined by two VA doctors, who said it was more likely that this was caused by post-service infection

rather than by an explosion while he was in the service.

Now if the case -- if the notice was defective, why does it not make sense to say to your client, show us that you can come up with some medical evidence that shows that this is service-related, something more than a doctor who says it's not inconceivable?

Then it makes sense to remand it. But if you can't do it on appeal, what sense does it make to remand it, where the same failure to provide evidence is going to doom his claim?

MR. LIPPMAN: Two answers to that, Your Honor.

The first is, the government makes the proposition that all we need to do is offer an explanation. But in legal terms, that is a proffer on appeal, and that is every bit as evidential as the actual evidence itself. Now, if we -- if we are to have a whole practice of proffers, it opens up a Pandora's box. I mean, where -- where do you stop if you make an exception for extra-record evidence, when the statutes make it clear that the evidence or whatever you are using has to be before the agency.

JUSTICE BREYER: Why is that such a tough thing to do? It sounds like it's sort of -- is there

some law out there that stops you from saying in the brief in a paragraph that, we would just like you to know, Judge, that we had some evidence here, or we have some now that we want to present to them. That's all.

And then if I see that, I would say, my goodness -- and you describe it in three sentences. Now what is -- the Constitution doesn't stop you from doing that, does it? What stops you from doing that?

MR. LIPPMAN: The statutes stop you from doing that.

JUSTICE BREYER: They stop you, but the Veterans Court said to do it. So -- and they are the one who know this area and they said you should have to do it.

MR. LIPPMAN: But with all due respect, I think the Veterans Court got it wrong. I mean --

JUSTICE BREYER: Between me and the Veterans Court, as to who knows best how to work this system, it's ten to one it's not me.

MR. LIPPMAN: Okay. Let's look at it this way. Let's take it outside the VCAA context. A veteran has a right to a hearing, an evidentiary hearing, upon request. Let's say he requests the hearing, and for whatever reason the VA doesn't schedule one. He loses that right even though he requests it. Are we then now

to have proffers on the court of appeals saying, well, I would have said this, I would have said this, I would have said --

JUSTICE BREYER: What they decided there is if there's no notice at all, no, you don't have to have a proffer, because it's up to the agency to do just what you want. But if it's one of these other three, far more technical things, which occur far more rarely, on that one, you better tell the judge in the brief how it makes a difference.

That's their conclusion. What's wrong with that?

MR. LIPPMAN: Well, there -- there is certainly no analysis to it. I mean, it's sort of an intuitive distinction and in my case, it doesn't work.

And I think --

JUSTICE KENNEDY: Well, the -- the statute says, and this is consistent with Justice Breyer's line of questioning, that the Veterans Court, the Court of Appeals, the Veterans Court of Appeals, shall give due account to the notice -- to the rule of prejudicial error. That seems to me to indicate that it has some discretion in how to decide the harmless error rules that it will apply, and that it knows more about it, in Justice Breyer's term, than either we or the Court of

Appeals for the Federal Circuit. Why can't I get that out of this statute?

MR. LIPPMAN: Well, I guess you would have to reconcile the more specific statute that deals with only able to submit evidence or any other material at the time -- at the of the agency's adjudication. In other words, I don't see that statute allowing post-agency adjudication proffers or even submitting evidence. I mean, just by the very line of your questioning, it seems to me that you find it interchangeable whether you assert it in your brief that this is what I would have done or whether you would have submitted the evidence itself. They are both evidential. And another problem, which is really --

JUSTICE ALITO: Your position seems to be not that the government should have to show prejudice, but as applied to a case like yours, that there is an irrebuttal presumption of prejudice. What could the government show? They would have to show that there is not a single ophthalmologist in the country who, if he or she examined Mr. Sanders, would find that the vision loss was attributable to a bazooka explosion in World War II?

MR. LIPPMAN: No, Your Honor. The -- what the government must show is well set forth in the

Federal Circuit's opinion. It must show that the claimant had either actual knowledge of what he needed to submit; second, that he had some constructive knowledge, in other words a reasonable claimant would have had notice; or three, that the claim couldn't entitled to benefits as a matter of law.

So that's the beauty --

JUSTICE BREYER: -- but I don't understand that. I mean, let's suppose, contrary to your wishes, that the client was not hurt. He was hurt by some other thing, nothing to do with the bazooka. That's not your client -- that's the imaginary client -- but everything else is the same.

Well, does that mean because they forgot to tell the client that the client has to go and produce some evidence, and she thought the Veterans Administration would produce all the evidence? Because they forgot that, your client wins and gets the money?

MR. LIPPMAN: Well --

JUSTICE BREYER: That doesn't seem --

MR. LIPPMAN: -- he wouldn't get the money, okay? Because all -- we are talking about a remand, not a --

JUSTICE BREYER: I know. Now you are going to be back in the remand and you now have to produce

some evidence, don't you, or you lose?

MR. LIPPMAN: Correct.

JUSTICE BREYER: So then why is it a big deal that you summarize what you're going to produce in the brief? We're back where we started.

MR. LIPPMAN: Let me answer it this way. Let's assume we do make proffers, as you suggest, at the Veterans --

JUSTICE BREYER: I might have called them a proffer. I just want to say it's a description in the brief of how you're hurt.

MR. LIPPMAN: Well, in the legal sense I consider it the same thing. Maybe Your Honors don't, but I do. And -- let -- let's say he proffers or describes in his brief what medical evidence he needs to submit.

How could he in good faith make a proffer and speculate on what the doctor -- let's say he is seeing a treating doctor. And on page 49 in the footnote, there is a discussion of what I'm going to explain to you now. But let's say he alleges, well, if I had gotten notice, I would have gone to my treating doctor, and I would have submitted questions and I would have submitted the claims file, but I can't know in good faith what the doctor would say. It's inherently

speculative. And that's one good policy reason, apart from the clear categorical language of the statute.

CHIEF JUSTICE ROBERTS: You started earlier, at one point, to say how this actually worked out in your case. Could you just spend a minute to explain that?

MR. LIPPMAN: How --

CHIEF JUSTICE ROBERTS: How it makes a difference in your case.

MR. LIPPMAN: Sure. It was a little unclear until a case -- if I may answer it this way, Your Honor.

My -- the Board of Veterans Appeals decided there was only one medical evidence it would follow, and that was the 2000 VA exam. And that exam really denied the veteran because there was no corroborating medical evidence contemporary with his injury and the symptomology thereafter. If I could have it go back down, what I would do is try to find what we call "buddy statements," lay statements, that would corroborate that he had symptoms from time of service and well on, which under a case called Buchanan is sufficient evidence to base a finding of service connection.

CHIEF JUSTICE ROBERTS: So why wasn't that enough for you to establish prejudice, regardless of who had the burden?

MR. LIPPMAN: To make that allegation at the court of appeal that I would have gotten this?

CHIEF JUSTICE ROBERTS: Uh-hmm.

MR. LIPPMAN: Quite frankly, I don't know if I would have gotten it. I mean, I would try.

CHIEF JUSTICE ROBERTS: Well, you would phrase the prejudice in terms of what you would have done and what you weren't able to do, and which you can now go back and do if it's remanded. You don't have to have the evidence that three people would say he was complaining about the vision loss at the time. It just seems a reasonable thing to -- you know, maybe it is reasonable, maybe it's not; but the Veterans Administration has more knowledge about that.

MR. LIPPMAN: Your Honor, in a way, the third prong of the Federal Circuit's analysis does that. It tells the government: Look, if the veteran could not prove his claim, no matter what the facts -- evidentiary development was, then the veteran loses.

So really it's all contained in the third prong. And that's why the Federal Circuit's analysis in my opinion is so good. It's because it doesn't make you go outside of the record to reach these issues, and it allows the government a lot of room to prove that it's not worthwhile, this claim's not worthwhile to, remand.

I ask the Court to really carefully look at that because I know the Federal Circuit spent -- must have spent a lot of time in coming up with that analysis.

JUSTICE GINSBURG: Do you know where this first level, second level -- I'm looking at the statute on page 98a of the petition. And it seems to me all part of one. It is one notice? It doesn't seem to specify a second and a third. It's describing the contents.

MR. LIPPMAN: Well --

JUSTICE GINSBURG: "As part of that notice, the Secretary shall indicate which portion of the information and evidence is to be provided by the claimant and which portion by the Secretary." The statute seems to be talking about one notice, not "first level," "second level."

MR. LIPPMAN: Well, they haven't enumerated it, Your Honor, as such. But analytically it breaks down to that. But the fourth element, because it says, look, you'll have to tell the claimant what the contents, what you need. Then it says, well, what we are going to get for you, and then that's the second. And third one is what you have to get.

The fourth one was engrafted upon it because

in the regs 3.159 has a more generalized advisement, in addition to this --

JUSTICE GINSBURG: I thought that was taken out, the fourth one. No?

MR. LIPPMAN: Not to my knowledge, Your Honor.

JUSTICE GINSBURG: And tell me what that is. It's not in the statute?

MR. LIPPMAN: No, it's in 3.159. I don't recall the exact -- it's 38 C.F.R. 3.159. I don't recall offhand the exact subdivision, Your Honor.

JUSTICE KENNEDY: Well, it just tells that the Secretary requests the claimant provide any evidence in the claimant's possession that pertains to the claim.

MR. LIPPMAN: Right.

JUSTICE KENNEDY: That's fairly straightforward.

MR. LIPPMAN: It's not as important as the first, second, and third elements of the statute, for sure, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. LIPPMAN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Miller, you have four minutes remaining.

REBUTTAL ARGUMENT OF ERIC D. MILLER

ON BEHALF OF THE PETITIONER

MR. MILLER: Thank you, Mr. Chief Justice.

I would like to make just three points. First, on the question of what is provided to the claimant after the denial in the regional office. Before they get to the Board of Veterans Appeals, the regional office issued them a statement of the case, and that's described at 38 C.F.R. 19.29, and that regulation has fairly detailed requirements about what has to be in there in terms of a description of the evidence, the description of the applicable laws and regulations and analysis of the board's conclusions, or the regional office's conclusions and its application of the law to the evidence.

The second point --

CHIEF JUSTICE ROBERTS: So you think it's perfectly clear from that what gaps need to be filled in?

MR. MILLER: In many cases, it would be. But perhaps there would be some where it wouldn't, and of course in those cases if there can be some articulation of why it wasn't then we would agree --

JUSTICE SOUTER: At that point is the claimant disentitled to have a lawyer?

MR. MILLER: No. Once they file the notice

of disagreement in the regional office and receive the statement of the case, they could then have a lawyer in the board.

JUSTICE SOUTER: But at the point they get the notice and they are trying to evaluate the significance of the notice, they are not entitled to a lawyer?

MR. MILLER: If you are referring to the statement of the case, by the time they receive the statement of the case they are at the stage of the proceedings where they could get a lawyer.

JUSTICE SOUTER: Well --

JUSTICE KENNEDY: But what about the notice, the original notice? They don't have a lawyer at that point? That was Justice Souter's question. I didn't --

MR. MILLER: Oh, if you meant the original notice required by the statute. No.

JUSTICE SOUTER: No -- at the point where the statute requires original notice, they are not entitled to a lawyer.

MR. MILLER: Correct.

JUSTICE SOUTER: We agree on that. Now, they have gone through stage one of the litigation and they have lost. And they are getting a statement of reasons. At that point, are they entitled to have a

lawyer?

MR. MILLER: Yes.

JUSTICE SOUTER: But whether -- I guess the situation that I am concerned with is, the person up to that moment not only does not have, but is not entitled to have a lawyer. The person then gets a piece of paper in the mail that says, "You lost. These are the reasons." If the person -- if the claimant then says, "I don't know what they are talking about. I will go get a lawyer," then I can understand at that point a relatively sophisticated mind is going to come in to understand it. But if the client simply reads it and says, "I really don't know what they are talking about here or at least I think I know what they are talking about, and I guess it's hopeless," the person is not likely to have legal advice.

And what I'm getting at is that the person at that stage, at the moment the notice arrives, is in a position, I would think, of extreme relative disadvantage.

MR. MILLER: I think --

JUSTICE SOUTER: You can see where I am going with the argument.

MR. MILLER: Yes. The important point is that the only way the prejudicial error becomes an issue

and really the paradigmatic case that we are talking about is where the veteran does get counsel and has reached the Veterans Court and has identified the error in a way that's persuasive to the Veterans Court, but nonetheless identifies no additional evidence that they would have --

JUSTICE SOUTER: No, but it seems to me that there are two points at which the veteran is at a disadvantage. And you are talking about the second of the two. I am talking about the first of the two. And the first of the two is the point at which the -- I mean, following the hearing, the veteran gets the notice and the veteran is not in a very sophisticated position to evaluate what the veteran is being told.

MR. MILLER: Yes, and a claimant who in the Veterans Court can say, you know, "I didn't understand and as a result I failed to present the -- because of the defective notice and my lack of understanding of the statement of the case, I didn't present this important piece of evidence, and here's how it would have been material," in that case, they would be entitled to a remand. But a remand --

CHIEF JUSTICE ROBERTS: When you have been saying "entitled to a lawyer," do you mean entitled to a lawyer or allowed to have a lawyer?

MR. MILLER: Allowed to retain counsel.

CHIEF JUSTICE ROBERTS: You can finish your --

MR. MILLER: I was just going to say that, given the volume of cases that the VA confronts, there is a serious harm to the system in unnecessary remands that have to be given priority over other cases and that divert resources from the adjudication of meritorious claims.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

T