

**U.S. DISTRICT COURT MAGISTRATE  
MEMORANDUM AND RECOMMENDATION  
(JANUARY 14, 2013)**

**IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

STEPHANIE M. MICHAEL, §  
*Plaintiff*, §  
§  
§ CIVIL ACTION  
§ NO. H-12-3093

UNITED STATES OF AMERICA,  
*Defendant*.

**MEMORANDUM AND RECOMMENDATION**

Pending before the court<sup>1</sup> is Defendant's Motion to Dismiss (Doc. 10). The court has considered the motion, all relevant filings, and the applicable law. For the reasons set forth below, the court **RECOMMENDS** that Defendant's motion be **GRANTED**.

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<sup>1</sup> This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. Doc. 9.

Also pending before the court are Plaintiff's Motion to Expedite Proceedings and Objection to Rule 16 Scheduling Order (Doc. 8) and Plaintiff's Motion for Summary Judgment or Default Judgment (Doc. 15)

If this memorandum and recommendation is adopted, Plaintiff's motion to expedite proceedings and Plaintiff's motion for summary judgment will be **MOOT.**

### **I. Case Background**

As the court understands Plaintiff's complaint, Plaintiff, a veteran with claims of anxiety and depression, applied for benefits from the United States Department of Veteran Affairs ("VA") in oraround September 1993.<sup>2</sup>

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<sup>2</sup> See Doc. 1, Pl.'s Compl., ¶ 19.

Plaintiff claims that the “VA did not recognize the claims and failed to rate code or adjudicate the issue although required to adjudicate all issues raised.”<sup>3</sup> Plaintiff submitted a subsequent application for benefits and, in 2004, was awarded VA benefits for anxiety with an effective date of August 2003.<sup>4</sup>

Plaintiff objected to August 2003 as the effective date of compensation for her VA benefits, claiming that the determination was a clear and unmistakable error.<sup>5</sup> She exhausted her administrative remedies as to the effective date of compensation by submitting a Notice of Disagreement with the determination, filing a motion for reconsideration with the VA, and appealing to the Court of Appeals for Veterans Claims for a writ of mandamus, the denial of which was affirmed by the Federal Circuit.<sup>6</sup> In December 2011, a reduction of Plaintiff’s benefits was proposed.<sup>7</sup>

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<sup>3</sup> Id., see also id. ¶ 14.

<sup>4</sup> See id. ¶ 20.

<sup>5</sup> See id. ¶¶ 21, 29.

<sup>6</sup> See id. ¶¶ 21-24.

<sup>7</sup> See id. ¶ 26. The complaint references December 16, 2012, as the date on which the reduction was proposed. See id. Given that this pleading was filed in October 2012, the court assumes that the December 2012 is a typographical error and should read December 16, 2011, as the relevant date.

A hearing on the reduction issue was held in May 2012 and, in June 2012, a decision granting Plaintiff's continued compensation at the original rate was issued.<sup>8</sup> At the hearing, Plaintiff was not permitted to testify regarding the August 2003 effective date of her compensation.<sup>9</sup> On October 18, 2012, Plaintiff filed this lawsuit against Defendant under the Federal Tort Claims Act ("FTCA"),<sup>10</sup> alleging that Defendant was negligent in handling Plaintiff's benefits claims dating back to 1993, thereby depriving her of VA benefits to which she was entitled.<sup>11</sup> On December 10, 2012, Plaintiff filed a motion to expedite the proceedings.<sup>12</sup> Eight days later, on December 18, 2012, Defendant filed the pending motion to dismiss and a response to Plaintiff's motion to expedite the proceedings.<sup>13</sup>

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<sup>8</sup> See id. ¶ 27.

<sup>9</sup> See id.

<sup>10</sup> 28 U.S.C. §§ 2671 et seq.

<sup>11</sup> See Doc. 1, Pl.'s Compl.

<sup>12</sup> See Doc. 8, Pl.'s Mot. to Expedite Proceedings

<sup>13</sup> See Doc. 10, Def.'s Mot. to Dismiss; Doc. 11, Def.'s Resp. to Pl.'s Mot. to Expedite Proceedings.

Approximately two weeks later, on January 3, 2013, Plaintiff filed objections to Defendant's pending motion, as well as a document entitled "Motion for Revision Based on Clear and Unmistakable Error."<sup>14</sup> Based on Plaintiff's assertion that the aforementioned document constitutes the sole exhibit to her objections to Defendant's pending motion, in conjunction with the contents of the document, the court construes this document as an exhibit to her objections to Defendant's motion, rather than as a motion.<sup>15</sup> Also on January 3, 2013, Plaintiff filed a motion for summary judgment.<sup>16</sup>

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<sup>14</sup> See Doc. 13, Pl.'s Objs. to Def.'s Mot. to Dismiss; Doc. 14, Pl.'s Mot. for Revision.

<sup>15</sup> See generally Doc. 14, Pl.'s Mot. for Revision; see also Doc. 13, Pl.'s Objs. to Def.'s Mot. to Dismiss, p. 7.

<sup>16</sup> Doc. 15, Pl.'s Mot. for Summ. J.

## II. Dismissal Standard

Defendant moves to dismiss Plaintiff's complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure ("Rule") 12(b)(1). The court should decide a Rule 12(b)(1) motion before addressing any attack on the merits. Ramming v. United States, 281 F.3d 158, 161 (5<sup>th</sup> Cir. 2001). A dismissal of a complaint pursuant to Rule 12(b)(1) "is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction." Id. at 161.

Dismissal of an action is appropriate whenever the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); 12(h)(3). Federal courts may exercise jurisdiction over cases only as authorized by the United States Constitution and the jurisdictional statutes. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); see also Howery v. Allstate Ins. Co., 243 F.3d 912, 916 (5<sup>th</sup> Cir. 2001). Article III

of the United States Constitution confines federal court jurisdiction to cases and controversies and, thus, requires that a plaintiff have standing to bring suit. See Time Warner Cable, Inc. v. Hudson, 667 F.3d 630, 635 (5<sup>th</sup> Cir. 2012). The party asserting jurisdiction bears the burden of overcoming the presumption that the cause falls outside the court's limited jurisdiction. Kokkonen, 511 U.S. at 377; see also Time Warner Cable, Inc., 667 F.3d at 635.

### III. Analysis

In support of its motion to dismiss Plaintiff's complaint on the grounds that the court lacks subject matter jurisdiction to adjudicate the case, Defendant argues that: (1) the doctrine of sovereign immunity precludes Plaintiff's claims; and (2) judicial review of VA benefits decisions is limited by statute. The court considers the merits of Defendant's arguments.

The FTCA provides an administrative procedure for tort claims brought against the Federal

Government or any of its agencies, and provides the sole remedy for such claims arising from actions taken by federal employees within the scope of their employment. 28 U.S.C. §§ 2672, 2679. Absent an FTCA claim, the court retains subject matter jurisdiction to consider a plaintiff's claims only where sovereign immunity has been waived. See Price v. United States, 69 F.3d 46, 49 (5<sup>th</sup> Cir. 1995) (“the United States is immune from suit unless it has waived its immunity and consented to suit.”). The court construes waivers of sovereign immunity in favor of the sovereign. See Jeanmarie v. United States, 242 F.3d 600, 604 (5<sup>th</sup> Cir. 2001) (quoting McMahon v. United States, 342 U.S. 25, 27 (1951)).

Here, although Plaintiff characterizes her claim as negligence, she does not allege harm from a negligent act. Rather, Plaintiff takes issue with the VA's decisions—the personal effects of which Plaintiff claims as harm—regarding the 2003 effective date of

her benefits, and thereby seeks review of one or more of the VA's decisions. With regard to lawsuits seeking review of VA decisions or procedures, the United States has waived its sovereign immunity and consented to suit "in the United States Court of Appeals for Veterans Claims, the United States Court of Appeals for the Federal Circuit, and the United States Supreme Court." Carney v. Jane, 2005 WL 2277490, at \*1, (S.D. Tex. Sep. 16, 2005) (citing In re Russell, 155 F.3d 1012, 1012-13 (8<sup>th</sup> Cir. 1998)) (unpublished).

Specifically, this limited waiver of sovereign immunity as to VA decisions and procedures is provided by the Veterans Judicial Review Act (“VJRA”),<sup>17</sup> enacted in 1988. See Zuspann v. Brown, 60 F.3d 1156, 1158 (5<sup>th</sup> Cir. 1995); see also Bates v. Nicholson, 398 F.2d 1355, 1363-64 (Fed. Cir. 2005). The enactment of the VJRA “clearly announced the intent of Congress to preclude review of benefits determinations in federal district courts.” Zuspann, 60 F.3d at 1158.

Under the VJRA, plaintiffs are provided with exclusive procedures for seeking judicial review of decisions made by the VA. See id.; see also Oliver v. Kelly, slip op., No. 12-CV-642, 2012 WL 4207301, at \*3 (W.D. La. Aug. 31, 2012) (quoting Zuspann, 60 F.3d at 1158). In particular, “[t]he VJRA allows veterans to appeal benefits determinations to the Board of Veterans’ Appeals.” Zuspann, 60 F.3d at 1158-59; see 38 U.S.C. § 7104.

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<sup>17</sup> 38 U.S.C. §§ 7251 et seq.

The Court of Veterans Appeals has exclusive jurisdiction to review the decisions of the Board of Veterans' Appeals, while the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to review the Court of Veterans Appeals. See Zuspann, 60 F.3d at 1159; 38 U.S.C. §§ 7252, 7292.

Moreover, 38 U.S.C. § 511(a) limits judicial review of certain determinations of veterans' benefits:<sup>18</sup>

The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

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<sup>18</sup> Plaintiff argues that because this case is covered by 38 U.S.C. § 1975, 38 U.S.C. § 511(b) applies to exclude this case from the provision set forth in 38 U.S.C. 511(a). The court disagrees. Section 1975 of Title 38 concerns “Servicemembers’ Group Life Insurance,” which is not at issue in the present case. See 38 U.S.C. § 1975.

The court thus finds that both the VJRA and 38 U.S.C. § 511(a) preclude the court from reviewing Plaintiff's claims regarding the VA's determination of the effective date of her benefits. Given the above, in conjunction with Plaintiff's failure to allege an applicable waiver of sovereign immunity, the court finds that it lacks subject matter jurisdiction over Plaintiff's action.

Accordingly, the court **RECOMMENDS** that Defendant's motion to dismiss be **GRANTED**.

#### **IV. Conclusion**

Based on the foregoing, the court **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED**. If this memorandum and recommendation is adopted, Plaintiff's motion to expedite proceedings and Plaintiff's motion for summary judgment will be **MOOT**.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have fourteen days from the receipt

thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

**SIGNED** in Houston, Texas, this 14th day of January, 2013.

**U.S. DISTRICT COURT ORDER ADOPT  
MAGISTRATE JUDGE'S MEMORANDUM AND  
RECOMMENDATIONS (4:12-CV-3093)  
(February 11, 2013)**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

STEPHANIE M. MICHAEL,  
*Plaintiff*

CIVIL ACTION  
No. H-12-0393

v.

UNITED STATES OF AMERICA  
*Defendant.*

**ORDER ADOPTING MAGISTRATE JUDGE'S  
MEMORANDUM &RECOMMENDATION**

Pending before the court is the Magistrate Judge's Memorandum & Recommendation (Dkt.18) recommending that the United States of America's ("United States") motion to dismiss (Dkt. 10) be granted. Having reviewed the Memorandum & Recommendation, the relevant documents within the record, plaintiff Stephanie M. Michael's ("plaintiff") objections (Dkts. 19, 21), and the applicable law, the court **OVERRULES** plaintiff's objections and **ADOPTS** the Magistrate Judge's Memorandum & Recommendation.

Plaintiff, a veteran with claims of anxiety and depression, contends that this court has jurisdiction to review the Department of Veteran Affairs's ("VA")

benefits determinations dating back to 1993, which she claims were negligently mishandled and caused her to be deprived of VA benefits in violation of the Fifth Amendment's Due Process Clause. *See* Dkt. 18 at 3. After finding that the plaintiff's complaint does not state a plausible claim for negligence, and instead seeks review of the underlying benefits decisions, the Magistrate Judge recommended dismissal of plaintiff's claims for lack of subject-matter jurisdiction in the Southern District of Texas. *Id.* at 6–8.

The court has reviewed the law regarding the government's narrow waiver of sovereign immunity regarding VA decisions, and the court agrees that plaintiff does not have the right to seek judicial review in this district court under the Federal Tort Claims Act. Rather, her claims can only be heard, under the Veterans Judicial Review Act of 1988 (“VJRA”), in the Board of Veterans’ Appeals, the United States Court of Appeals for Veterans Claims, the United States Court of Appeals for the Federal Circuit, and the United States Supreme Court. 38 U.S.C. § 511(a); *Zuspann v. Brown*, 60 F.3d 1156, 1158–59 (5th Cir. 1995) (explaining that the VJRA “announced the intent of Congress to preclude review of benefits determinations in federal district courts”); *King v. United States*, No. 1:11-cv-224, 2012 WL 4510047, at \*3 (S.D. Miss. Sept. 28, 2012) (“The Court finds that § 511(a) forecloses it from exercising jurisdiction over King’s claims in this action because underlying [King’s] claim[s] is an allegation that the VA unjustifiably denied him a veterans’ benefit.”) (internal quotation marks omitted).

In short, plaintiff’s claims for relief, although alleged to arise from the VA’s negligence, are inextricably

intertwined with a review of the VA's benefits decisions, which deprives this court of subject-matter jurisdiction.

The United States' motion to dismiss (Dkt. 10) is **GRANTED**, and plaintiff's claims are **DISMISSED WITHOUT PREJUDICE** to refiling in a court of competent jurisdiction. Plaintiff's motion to expedite proceedings (Dkt. 8), motion for revision based on clear and unmistakable error (Dkt. 14), and motion for summary judgment (Dkt. 15) are **DENIED AS MOOT**.

It is so **ORDERED**.

Signed at Houston, Texas on February 11, 2013.

/s/ Gray H. Miller  
Gray H. Miller  
United States District Judge

**VA FINAL DENIAL ADMINISTRATIVE TORT  
CLAIM (28 U.S.C. 2675 NOTICE)  
(March 7, 2014)**

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DEPARTMENT OF VETERANS AFFAIRS  
Office of Regional Counsel  
6900 Almeda Road Houston, TX 77030

Andrée Boudreaux  
Regional Counsel  
(713) 383-2784  
(713) 383-2783

In Reply Refer To: 362/02

March 7, 2014

Via CMRRR 91 7199 9991 7030 7636 5133

Ms. Stephanie Michael  
13480 S. Thorntree Dr. #802  
Houston, TX 77015

Re:           Administrative Tort Claim  
Claimant:    Ms. Stephanie Michael

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Dear Ms. Michael:

This office has now completed our review of the "Claim for Damage, Injury or Death" (Standard Form 95) and six page attachment submitted by you to the Department of Veterans Affairs (VA) on September 13, 2013, seeking \$10,200,000.00 in damages. In this submission, you allege that you have been wrongfully deprived of a retroactive VA benefit payment covering

the period from 1993 to 2003. We again take the opportunity to inform you (as we did in our letter of September 5, 2012 related to your last SF-95 filing) that the issues which you have raised in your submission —VA benefit matters—cannot by law be considered under the Federal Tort Claims Act (FTCA). Thus, your submission constitutes a non-payable claim which cannot be considered under the FTCA. Accordingly, your claim is hereby denied.

If you are dissatisfied with this decision, you may file a request for reconsideration of this claim with VA General Counsel by any of the following means: (1) you may mail your request to the Department of Veterans Affairs, General Counsel (022B), 810 Vermont Avenue, N.W., Washington, DC 20420; (2) you may file your request by data facsimile (fax) to (202) 273-6385; or (3) you may email your request to OGC.torts@mail.va.gov. To be timely filed, VA must receive this request prior to the expiration of six months from the date of the mailing of this final denial. Upon filing such a request for reconsideration, VA shall have 6 months from the date of that filing in which to make final disposition of the claim, and his option to file suit in an appropriate U.S. District Court under 28 U.S.C. 2675(a) shall not accrue until 6 months after filing of any such request for reconsideration (28 C.F.R. Section 14.9).

In the alternative, if you are dissatisfied with the action taken on this claim, you may file suit in accordance with the Federal Tort Claims Act, sections 1346(b) and 2671-2680, title 28, United States Code, which provides that a tort claim that is administratively denied may be presented to a Federal district court for judicial consideration. Such

a suit must be initiated within 6 months after the date of the mailing of this notice of final denial as shown by the date of this letter (section 2401(b), title 28, United States Code). If you do initiate such a suit, you are further advised that the proper party defendant is the United States, not the Department of Veterans Affairs (28 U.S.C. §§1346(b) and 2671-2680).

Please note that FTCA claims are governed by a combination of Federal and state laws. Some state laws may limit or bar a claim or lawsuit. VA attorneys handling FTCA claims work for the Federal government and cannot provide advice regarding the impact of state laws or state filing requirements.

Sincerely,

/s/ Andrée Boudreaux  
Andrée Boudreaux  
Regional Counsel  
AB/dhl

**(FEBRUARY 3, 2015) RES JUDICATA DISMISSAL**  
**ORDER OF THE SOUTHERN DISTRICT COURT**  
**OF TEXAS**

UNITED STATES DISTRICT COURT SOUTHERN  
DISTRICT OF TEXAS HOUSTON DIVISION

STEPHANIE MICHAEL,  
*Plaintiff,*

v.

UNITED STATES OF AMERICA,  
*Defendant.*

Civil Action H-14-2421  
Before: Stephen Wm SMITH United States  
Magistrate Judge

This case regarding denial of Veterans Administration benefits is before the court on the Government's motion to dismiss (Dkt. 7). The Government contends that this action must be dismissed based on res judicata and lack of subject matter jurisdiction. The motion to dismiss is granted. Michael's motion for relief (Dkt. 8), and motion to strike and compel discovery (Dkt. 17) are denied.

Michael's original complaint alleges she "has been deprived of rights and property due to the negligent actions of commission and omission by several VA employees over a period of 20 years to present." Dkt. 1 at 1. Michael previously asserted her claims in *Stephanie M. Michael v. United States of America*, Civil Action No. 4:12-cv-3093.<sup>1</sup> The district court dismissed Civil Action 12-cv-3093 for lack of subject

matter jurisdiction because the Court of Veterans Appeals has exclusive jurisdiction to review the decisions of the Board of Veterans' Appeals, and the Court of Appeals for the Federal Circuit has exclusive jurisdiction to review the Court of Veterans Appeals. *Stephanie M. Michael v. United States of America*, Civil Action No. 4:12-cv-3093, slip op. at 2 (Feb. 11 2013) (Dkt. 7-2). Michael did not appeal.

The doctrine of res judicata bars Michael's litigation of her claims in this court. The elements of res judicata are: (1) the parties are identical; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions. *Oreck v. Direct, LLC v. Dyson, Inc.*, 560 F.3d 398, 401 (5th Cir. 2009). All elements of res judicata are present here. While the prior ruling was without prejudice to refiling in a court of competent jurisdiction, its jurisdictional determination is a final order with res judicata effect. *Ins. Corp. of Ireland, Ltd. v. Camagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *Comer v. Murphy Oil U.S.A., Inc.*, 718 F.3d 460, 469 (5th Cir. 2013).

<sup>1</sup> To the extent Michael has asserted claims under 42 U.S.C. §§ 1983, 1985 that were not asserted in the prior action, they must be dismissed because suits against the United States brought under civil rights statutes are barred by sovereign immunity. *Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999).

Michael appears to argue that the district court's dismissal order in 12-cv-3093 is a void judgment. A judgment may be collaterally attacked if it is void for lack of jurisdiction. *Jacuzzi v. Pimienta*, 762 F.3d 419, 420 (5th Cir. 2014). But it is Michael's position that the district court has jurisdiction to review her claims. *See* Dkt. 8 at 3, ¶ 7. Michael provides no basis for concluding that the final order dismissing Civil Action No. 12-cv-3093 is void.

To the extent Michael is arguing that this court should hear her case because the decisions of the Board of Veterans Appeals, Court of Veterans Appeals, and/or United States Court of Appeals for Federal Circuit are void, that in no way endows this court with jurisdiction over her claims for veterans benefits.

For these reasons, the Government's motion to dismiss (Dkt. 7) is granted. This action is dismissed with prejudice to refiling in the United States District Courts. This is a final order.

Signed at Houston, Texas on February 3, 2015.

/s/ Stephen Wm. Smith  
United States Magistrate Judge

**(MARCH 2, 2015) ORDER OF DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS HOUSTON  
DIVISION

STEPHANIE MICHAEL,  
*Plaintiff,*  
v.

UNITED STATES OF AMERICA,  
*Defendant.*

Civil Action H-14-2421 Before: Stephen Wm. SMITH  
United States Magistrate Judge

Plaintiff's petition of interlocutory appeal (Dkt. 20) is terminated as moot. This court issued a final dismissal order (Dkt. 19). The dismissal order is not interlocutory. There is no need to file a petition for leave to file an appeal.

Plaintiff's motion for reconsideration (Dkt. 21) is denied. Federal Rule of Civil Procedure 59(e) is properly invoked "to correct manifest errors of law or fact or to present newly discovered evidence." *Templet v. Hydrochem, Inc.* 479 (5th Cir. 2004). A motion for reconsideration is "not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Id.* Plaintiff has not met her burden to show any basis for reconsideration.

Signed at Houston, Texas on March 2, 2015.

/s/ Stephen Wm Smith  
United States Magistrate Judge

**U.S. COURT OF APPEALS FOR THE FIFTH  
CIRCUIT PER CURIAM ORDER  
(September 17, 2015)**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 15-20108  
Summary Calendar

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**STEPHANIE MICHAEL,  
Plaintiff-Appellant,  
v.**

**UNITED STATES OF AMERICA  
Defendant-Appellee.**

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**Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:14-CV-2421**

**Before KING, CLEMENT, OWEN, Circuit Judges.  
PER CURIAM\***

Stephanie Michael, a veteran of the United States Marine Corps, brought claims under the Federal Tort Claims Act and 42 U.S.C. 1983 and 1985 against the Government alleging that the Department of Veterans Affairs deprived her of her right to benefits.

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**\*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. 47.5.4**

The Government filed motion to dismiss. The district court granted the Government's motion and dismissed the action for reasons of res judicata and sovereign immunity. We affirm.

We review the res judicata effect of a prior judgment and the existence of sovereign immunity *de novo*.<sup>1</sup> This Court has held:

The preclusive effect of a prior court judgment is controlled by federal res judicata rules. Res judicata is appropriate if: 1) the parties to both actions are identical (or at least in privity); 2) the judgment in the first action is rendered by a court of competent jurisdiction; 3) the first merits; and 4) the same claim or cause of action is involved in both suits.<sup>2</sup>

"It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal.<sup>3</sup>

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<sup>1</sup> *Oreck Direct, LLC v. Dyson, Inc.*, 560 F.3d 398, 401 (5th Cir. 2009); *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 287 (5th Cir. 1993).

<sup>2</sup> *Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 937 (5<sup>th</sup> Cir. 2000) (citations omitted).

<sup>3</sup> *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); accord *Comer v. Murphy Oil USA, Inc.* 718 F.3d 460, 469 (5th Cir. 2013).

Michael previously brought suit against the Government in the Southern District of Texas, which dismissed the case without prejudice for lack of subject matter jurisdiction.<sup>4</sup> Michael's claims are the same as her prior lawsuit and attack the processing and outcome of her application for veterans' benefits. Although Michael added a claim under 1983 and 1985 in the present case, such claims are precluded by sovereign immunity.<sup>5</sup> The district court dismissed the present action "with prejudice to refiling in the United States District Courts."

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<sup>4</sup> Order Adopting Magistrate Judge's Memorandum and Recommendation, *Michael v. United States*, No. 4:12-cv-03093(S.D. Tex. Feb. 11, 2013), ECF No.22; Final Judgment, *Michael v. United States*, No. 4:12-cv-03093(S.D. Feb. 11, 2013), ECF No. 23, R at 32-42.

<sup>5</sup> *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286(5th Cir.1999) (This Court has long recognized that suits against the United States brought under the civil rights statutes are barred by sovereign immunity."(citing *Unimex, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 594 F.2d 1060, 1061(5<sup>th</sup> Cir. 1979).

The Veterans Judicial Review Act “created an exclusive review procedure by which veterans may resolve their disagreements with the Department of Veterans Affairs.”<sup>6</sup> A veteran may appeal a benefits determination to the Board of Veterans Appeals, and the Court of Veterans Appeals has exclusive jurisdiction to review the Board’s decision.<sup>7</sup> The Federal Circuit Court of Appeals has exclusive jurisdiction to review the decisions of the Court of Veterans Appeals.<sup>8</sup> Because Michael “challenges the VA’s decision to deny [her] benefits, the district Court does not have jurisdiction” over her complaint.<sup>9</sup>

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<sup>6</sup> *Zuspann v. Brown*, 60 F.3d 1156, 1158 (5th Cir. 1995)

<sup>7</sup> *Id.* at 1158-59.

<sup>8</sup> *Id.* at 1159.

<sup>9</sup> *Id.* at 1158.

**(AUGUST 8, 2016) UNITED STATES SUPREME  
COURT CERIORARI REHEARING DENIED**

Supreme Court of the United States Office of the  
Clerk  
Washington, DC 20543-0001

**Scott S. Harris  
Clerk of the Court  
(202) 479.3011**

August 8, 2016

Ms. Stephanie Michael  
P.O. Box 96364  
Houston, TX 77213  
Re: Stephanie Michael v. United States No. 15-8283

Dear Ms. Michael:  
The Court today entered the following order in the  
above-entitled case:  
The petition for rehearing is denied.

Sincerely,  
/s/ Scott S. Harris  
Scott S. Harris, Clerk

**U.S. COURT OF APPEALS FOR VETERANS  
CLAIMS-LETTER FROM CLERK  
(September 1, 2016)**

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UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS  
*625 Indiana Avenue NW, Suite 900*  
*Washington, DC 20004*

September 1, 2016

Ms. Stephanie Michael  
P.O. Box 96364  
Houston, TX 77213

Dear Ms. Michael:

This is in response to your correspondence received by the Court on August 29, 2016.

The Court can only act within the authority given it by Congress which is limited to the review of **final** decisions of the Board of Veterans' Appeals (Board) that are adverse to the veteran and which the veteran then appeals to the Court within 120 days of that final decision. I do not find that you have a case at this Court. You may want to redirect your inquiry to your local regional office or the Board. Their contact information is:

Board of Veterans Appeals  
Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420  
800-923-8387

Sincerely,  
/s/Anne P. Stygles  
Anne P. Stygles  
Chief Deputy Clerk of Operations

**(DECEMBER 28, 2016) U.S. COURT OF APPEALS**  
**FOR VETERANS CLAIMS: PETITION**  
**DECLARATORY JUDGMENT DENIED**

NO. 16-3356

STEPHANIE MICHAEL, PETITIONER,  
V.

ROBERT A. MCDONALD,  
SECRETARY OF VETERANS AFFAIRS,  
RESPONDENT.

Before GREENBERG, *Judge*. **ORDER**

*Note: Pursuant to U.S. Vet. App. R. 30(a), this action  
may not be cited as precedent.*

On September 29, 2016, the pro se petitioner filed a petition seeking a declaratory judgment. On October 11, 2016, the petitioner filed a motion to withdraw her petition. On October 18, 2016, the Court granted the petitioner's motion to withdraw. On November 9, 2016, judgment issued. On November 10, 2016, the appellant filed a motion to stay the issuance of mandate and an amended petition for relief in the form of a declaratory judgment. For the purposes of addressing the request of the petitioner, the Court will revoke the November 9 judgment in this matter and address the petitioner's amended petition.

The Court concludes that it must deny the petitioner's petition because the Court does not have the jurisdiction to issue declaratory judgments. This Court adheres to the case-or-controversy jurisdictional constraints provided for in Article III of the U.S. Constitution. *See Mokal v. Derwinski*, 1 Vet.App. 12, 13-15 (1990). Because there is no case or controversy to attach to, the Court has no choice but to deny the requested relief of the petitioner.

On consideration of the foregoing, it is

ORDERED that judgment is REVOKED. It is further

ORDERED that the Court's stamp grant of the appellant's motion to withdraw her petition is REVOKED. It is further

ORDERED that the petitioner's amended petition for relief in the form of a declaratory judgment is denied. It is further

ORDERED that the motion to stay the issue of mandate is DISMISSED as moot.

DATED: December 28, 2016

BY THE COURT: WILLIAM S. GREENBERG, Judge

Copies to:

Stephanie Michael

VA General Counsel (027)

**(JUNE 12, 2017) UNITED STATES COURT OF  
APPEALS FOR THE FEDERAL CIRCUIT,  
AFFIRMED DECLARATORY JUDGMENT DENIAL**

STEPHANIE MICHAEL, Claimant-Appellant

v.

DAVID J. SHULKIN, SECRETARY OF VETERANS  
AFFAIRS, Respondent-Appellee

2017-1569

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-3356, Judge William Greenberg. Decided: June 12, 2017 STEPHANIE MICHAEL, Houston, TX, pro se. MARIA TERESA ACEVEDO, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by CHAD A. READLER, ROBERT E. KIRSCHMAN, JR., ELIZABETH M. HOSFORD; Y. KEN LEE, DEREK SCADDEN, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before LOURIE, MOORE, and O'MALLEY, *Circuit Judges*. PER CURIAM.

Stephanie Michael seeks review of the December 28, 2016 decision of the Court of Appeals for Veterans Claims ("Veterans Court") denying her petition for relief in the form of declaratory judgment. *Michael v. McDonald*, No. 16-3356, 2016 WL 7448386 (Vet. App. Dec. 28, 2016). For the following reasons, we *affirm* the decision of the Veterans Court.

## BACKGROUND

Ms. Michael is an honorably-discharged disabled veteran of the United States Marine Corps. In October 2012, she filed a complaint in the United States District Court for the Southern District of Texas, alleging that the Department of Veterans Affairs (the "VA") acted negligently with respect to her benefits determinations, in violation of the Federal Tort Claims Act (the "FTCA"). *Michael v. United States*, No. 12-cv-03093, 2013 U.S. Dist. LEXIS 189859 (S.D. Tex. Feb. 11, 2013). "After finding that [Ms. Michael]'s complaint d[id] not state a plausible claim for negligence, and instead s[ought] review of the underlying benefits decisions," the district court dismissed her complaint for lack of jurisdiction. *Id.* at \*1\_2 (citing 38 U.S.C. § 511(a)).

On September 13, 2013, Ms. Michael submitted a Standard Form 95—"Claim for Damage, Injury, or Death"—to the VA, alleging wrongful deprivation of VA benefit payments covering the period from 1993 to 2003 and totaling \$10.2 million in damages, all in violation of the FTCA. The VA denied that claim via letter, stating: "[T]he issues which you have raised in your submission—VA Benefit matters—cannot by law be considered under the [FTCA]." J.A. 15.

Ms. Michael again filed suit in the Southern District of Texas, alleging that she had "been deprived of rights and property due to the negligent actions of commission and omission by several VA employees over a period of 20 years to present." *Michael v. United States*, No. 14-2421, 2015 WL 11123316, at \*1 (S.D. Tex. Feb. 3, 2015). On February 3, 2015, the district court granted the government's motion to dismiss for

lack of subject matter jurisdiction, relying on res judicata due to the previous 2013 dismissal order. *Id.* at \*1\_2. Ms. Michael timely appealed this decision to the United States Court of Appeals for the Fifth Circuit, which, on September 17, 2015, affirmed the district court's judgment. *Michael v. United States*, 616 F. App'x 146 (5th Cir. 2015). On May 16, 2016, the Supreme Court of the United States denied Ms. Michael's subsequent petition for writ of certiorari. *Michael v. United States*, 136 S. Ct. 2013 (2016).

On September 29, 2016, Ms. Michael filed a petition with the Veterans Court seeking a declaratory judgment, which she later withdrew. *Michael*, 2016 WL 7448386, at \*1. On November 9, 2016, judgment issued. *Id.* On November 10, 2016, Ms. Michael filed a motion to stay the issuance of mandate and an amended petition for relief in the form of a declaratory judgment. *Id.* Specifically, her motion appears to have requested a declaratory judgment that the Veterans Court has jurisdiction to hear her FTCA claims. The Veterans Court denied Ms. Michael's petition, "because the [Veterans] Court does not have the jurisdiction to issue declaratory judgments. . . . [It] adheres to the case-or-controversy jurisdictional constraints provided for in Article III of the U.S. Constitution." *Id.* (citing *Mokal v. Derwinshi*, 1 Vet. App. 12, 13-15 (1990)). Ms. Michael timely appealed to this court.

## **DISCUSSION**

Our ability to review a decision of the Veterans Court is limited. We may review "the validity of a decision of the [Veterans] Court on a rule of law or of any statute or regulation. . . or any interpretation thereof (other than a determination as to a factual matter) that was

relied on by the [Veterans] Court in making the decision." 38 U.S.C. § 7292(a) (2012). We have exclusive jurisdiction "to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under [38 U.S.C. § 7292], and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." *Id.* § 7292(c). Except to the extent that an appeal presents a constitutional issue, however, we "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." *Id.* § 7292(d)(2).

In her informal brief, Ms. Michael *appears* to raise essentially two separate arguments: (1) the Veterans Court erred by denying her request for declaratory judgment; and (2) the district court and Fifth Circuit erred in dismissing her complaint(s). Regarding the Veterans Court's decision, Ms. Michael argues that the Veterans Court "mischaracterize[ed]" her petition "as a petition for extraordinary relief—i.e., "mandamus"—instead of addressing it as a petition for "declaratory relief under 28 U.S.C. 2201." Appellant Br. at 1-5. Had the Veterans Court done so, she argues: "(1) it would have identified the case and controversy relevant [to] the Article III and statutory requirements. . . concluded to be nonexistent by the [Veterans Court], and; (2) could have issued a decision consistent with its existing procedures and applicable law . . ." *Id.* at 5.

We decline to vacate the Veterans Court's decision. The Veterans Court explicitly read Ms. Michael's petition as one for "declaratory judgment," not mandamus or other extraordinary relief. *Michael*,

2016 WL 7448386, at \*1. Ms. Michael's arguments on appeal indicate that such a reading was correct. Taking her petition as one for declaratory judgment, the Veterans Court did not err in denying it, but does appear to have misstated the relevant law. The Veterans Court described its reasoning for denial as follows:

The Court concludes that it must deny the petitioner's petition because the Court does not have the jurisdiction to issue declaratory judgments. This Court adheres to the case-or-controversy jurisdictional constraints provided for in Article III of the U.S. Constitution. *See Mokal v. Derwinski*, 1 Vet. App. 12, 13-15 (1990). Because there is no case or controversy to attach to, the Court has no choice but to deny the requested relief of the petitioner. *Michael*, 2016 WL 7448386, at \*1.

The most straightforward reading of this order suggests that, *because* the Veterans Court only entertains actual cases and controversies, it cannot issue declaratory judgments—as if the two were mutually exclusive. But 28 U.S.C. § 2201 only permits relief "[i]n a case of actual controversy" in the first place—a phrase that "refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Indeed, by the Veterans Court's reasoning, no Article III court could entertain petitions for declaratory judgments.

Rather, the Veterans Court cannot entertain petitions for declaratory judgments because it "is not 'a court of the United States' within the meaning of [28 U.S.C. § 2201] and cannot derive any powers therefrom." *In re*

*Wick*, 40 F.3d 367, 372 (Fed. Cir. 1994) (citing *Nagler v. Derwinski*, 1 Vet. App. 297, 306 (1991)). As the court observed in *Wick*, the term "court of the United States" is defined by statute as any court created by Act of Congress whose judges "are entitled to hold office during good behavior." *Id.* (quoting 28 U.S.C. § 451). Veterans court judges, on the other hand, are appointed by the President to serve a term of fifteen years. *Id.* (citing 38 U.S.C. § 7523). Accordingly, the Veterans Court properly denied Ms. Michael's petition for declaratory judgment as not within the scope of its authority.

Regarding the district court and Fifth Circuit, Ms. Michael's arguments are less scrutable. She states, in relevant part: The orders from U.S. Supreme Court; U.S. Court of Appeals for the Fifth Circuit; and the U.S. District Court for the Southern District of Texas at issue judicially imposing *Bivens* claim remedy provided by Congress for exclusive judicial review of final Board of Veterans Appeals decisions of the Secretary within the Veterans Judicial Review Act of 1988 thereby conferring subject matter jurisdiction upon the U.S. Court of Appeals for Veterans Claims is are void. Instead of is based on the merits of the (1) Government's conclusions from review prohibited by 38 USC 511 of the final and conclusive decisions of the Secretary in present case. Appellant Br. at 8-9.

Regardless of the substance of her arguments, Ms. Michael does not allege any of the limited bases on which this court would have jurisdiction to review the decision of the district court. *See* 28 U.S.C. § 1295. And she has not—indeed cannot—cite authority under which this court is able to review the decision-

making of the Fifth Circuit or the Supreme Court in this context.

## **CONCLUSION**

After full review of the record and careful consideration, we affirm.

**AFFIRMED**

## CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

### U.S. CONSTITUTION

#### **Art.I,§1**

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

#### **Art.I, §8**

“To constitute tribunals inferior to the Supreme Court” and “To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

#### **Art.II,§1**

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

**Art.II.§3**

He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

**Art. III,§1**

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

**Art. III, §2**

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens

of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

#### **Fifth Amendment, Due Process Clause**

No person shall be...deprived of life, liberty, or property, without due process of law.

#### **STATUTES**

##### **5 U.S.C. 551, et seq. Administrative Procedure Act**

###### **5 U.S.C. 551- Definitions**

**(1)**“agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

- (A)** the Congress;
- (B)** the courts of the United States;
- (C)** the governments of the territories or possessions of the United States;
- (D)** the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; [1]

(2) “person” includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) “party” includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) “rule making” means agency process for formulating, amending, or repealing a rule;

(6) “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive,

or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

- (13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and
- (14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

## **5 U.S.C. 552a- Records maintained on individuals, Privacy Act**

### **5 U.S.C. 552a(a): Definitions**

- (1) the term "agency" means agency as defined in section 552(e) [1] of this title;
- (2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;
- (3) the term "maintain" includes maintain, collect, use, or disseminate;
- (4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;
- (5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol,

or other identifying particular assigned to the individual;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals;

### **5 U.S.C. 552a(f) Agency Rules**

**(f) AGENCY RULES.**—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the

request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

### **5 U.S.C. 552a(g) Civil Remedies**

**(g) (1)CIVIL REMEDIES.**—Whenever any agency  
**(A)** makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;  
**(B)** refuses to comply with an individual request under subsection (d)(1) of this section;  
**(C)** fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or  
**(D)** fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

**(2)**

**(A)** In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other

way as the court may direct. In such a case the court shall determine the matter de novo.

**(B)** The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

**(3)**

**(A)** In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

**(B)** The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

**(4)** In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

**(A)** actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and

**(B)** the costs of the action together with reasonable attorney fees as determined by the court.

**(5)** An action to enforce any liability created under this section may be brought in the district court of the

United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

**5 U.S.C. 559- Effect on other laws; effect of subsequent statute**

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7,

sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

**5 U.S.C. 701, et seq. Administrative Procedure Act**

**5 U.S.C. 701-Application, definitions**

This chapter applies, according to the provisions thereof, except to the extent that—

- (1)** statutes preclude judicial review; or
- (2)** agency action is committed to agency discretion by law.

**(b)** For the purpose of this chapter—

- (1)** “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—
  - (A)** the Congress;
  - (B)** the courts of the United States;
  - (C)** the governments of the territories or possessions of the United States;
  - (D)** the government of the District of Columbia;
  - (E)** agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
  - (F)** courts martial and military commissions;
  - (G)** military authority exercised in the field in time of war or in occupied territory; or
  - (H)** functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; [1] and
- (2)** “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given to them by section 551 of this title.

### **5 U.S.C. 702- Right to review**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

### **5 U.S.C. 703- Form and venue of proceeding**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of

legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

### **5 U.S.C. 706- Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

**(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**28 U.S.C. 1346(b)(1)- United States as defendant**

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

**28 U.S.C. 2671-2680 – Federal Tort Claims Act**

**28 U.S.C. 2671- Definitions**

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term “Federal agency” includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but

does not include any contractor with the United States.

“Employee of the government” includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

“Acting within the scope of his office or employment”, in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

**28 U.S.C. 2675- Disposition by agency as perquisite, evidence**

**(a)** An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an

agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

**(b)** Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

**(c)** Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

### **28 U.S.C. 2680(a)- Exceptions**

The provisions of this chapter and section 1346(b) of this title shall not apply to—

**(a)** Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

**38 U.S.C. 501, et seq. Department of Veterans Affairs Codification Act of 1991**

**38 U.S.C. 501- Rules and regulations**

- (a)** The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including—
  - (1)** regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws;
  - (2)** the forms of application by claimants under such laws;
  - (3)** the methods of making investigations and medical examinations; and
  - (4)** the manner and form of adjudications and awards.
- (b)** Any rule, regulation, guideline, or other published interpretation or order (and any amendment thereto) issued pursuant to the authority granted by this section or any other provision of this title shall contain citations to the particular section or sections of statutory law or other legal authority upon which such issuance is based. The citation to the authority shall appear immediately following each substantive provision of the issuance.
- (c)** In applying section 552(a)(1) of title 5 to the Department, the Secretary shall ensure that subparagraphs (C), (D), and (E) of that section are complied with, particularly with respect to opinions and interpretations of the General Counsel.
- (d)** The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants, or benefits under a law administered by the Secretary.

**38 U.S.C. 511- Decisions of the Secretary, finality**

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to—

- (1) matters subject to section 502 of this title;
- (2) matters covered by sections 1975 and 1984 of this title;
- (3) matters arising under chapter 37 of this title; and
- (4) matters covered by chapter 72 of this title.

**38 U.S.C. 512- Delegation of authority, assignment of functions and duties**

(a) Except as otherwise provided by law, the Secretary may assign functions and duties, and delegate, or authorize successive redelegation of, authority to act and to render decisions, with respect to all laws administered by the Department, to such officers and employees as the Secretary may find necessary. Within the limitations of such delegations, redelegations, or assignments, all official acts and decisions of such officers and employees shall have the same force and effect as though performed or rendered by the Secretary.

(b) There shall be included on the technical and administrative staff of the Secretary such staff officers, experts, inspectors, and assistants (including legal assistants) as the Secretary may prescribe.

**38 U.S.C. 7251, et seq. Veterans Judicial Review Act of 1988**

**38 U.S.C. 7251- Status**

There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims.

**38 U.S.C. 7252- Jurisdiction, finality of decisions**

**(a)** The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

**(b)** Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.

**(c)** Decisions by the Court are subject to review as provided in section 7292 of this title.

**38 U.S.C. 7261-Scope of review**

**(a)** In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

**(1)** decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

- (2) compel action of the Secretary unlawfully withheld or unreasonably delayed;
- (3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
  - (D) without observance of procedure required by law; and
- (4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

- (1) take due account of the Secretary's application of section 5107(b) of this title; and
- (2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions

raised as to compliance with and the validity of the regulation.

## **REGULATIONS**

### **28 CFR part 14 Administrative Claims Under Federal Tort Claims Act**

#### **28 C.F.R. 14.1- Scope of regulations**

These regulations shall apply only to claims asserted under the Federal Tort Claims Act. The terms *Federal agency* and *agency*, as used in this part, include the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but do not include any contractor with the United States.

#### **28 C.F.R. 14.2 (a)- Administrative claims, when presented**

**(a)** For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

**28 C.F.R. 14.9- Notice of final denial**

**(a)** Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the agency action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

**(b)** Prior to the commencement of suit and prior to the expiration of the 6-month period provided in 28 U.S.C. 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request with the agency for reconsideration of a final denial of a claim under paragraph (a) of this section. Upon the timely filing of a request for reconsideration the agency shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of a request for reconsideration. Final agency action on a request for reconsideration shall be effected in accordance with the provisions of paragraph (a) of this section.

**28 C.F.R. 14.11- Supplementing regulations**

Each agency is authorized to issue regulations and establish procedures consistent with the regulations in this part.

**28 CFR part 15 Certification and Decertification in Connection with Certain Suits Based Upon Acts or Omissions of Federal Employees and Other Persons**

**28 C.F.R. 15.1- General provisions**

**(a)** This part contains the regulations of the Department of Justice governing the application for and the issuance of statutory certifications and decertifications in connection with certain suits based upon the acts or omissions of Federal employees and certain other persons as to whom the remedy provided by the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 28 U.S.C. 2672, is made exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against such Federal employees and other persons.

**(b)** As used in this part:

**(1)** *Appropriate Federal agency* means the Federal agency most closely associated with the program out of which the claim or suit arose. When it cannot be ascertained which Federal agency is the most closely associated with the program out of which the claim or suit arose, the responsible Director of the Torts Branch, Civil Division, Department of Justice, shall be consulted and will thereafter designate the appropriate Federal agency.

**(2)** *Federal employee* means “employee of the United States” as that term is defined by 28 U.S.C. 2671.

**(3)** *Covered person* means any person other than a Federal employee or the estate of a Federal employee as to whom Congress has provided by statute that the remedy provided by 28 U.S.C. 1346(b) and 2672 is made exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against such person.

**28 C.F.R. 15.3- Agency Report**

- (a)** The Federal employee's employing Federal agency shall submit a report to the United States Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose, and a copy of the report shall be sent by the employing Federal agency to the responsible Branch Director of the Torts Branch, Civil Division, Department of Justice.
- (b)** The appropriate Federal agency shall submit a report to the United States Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the person was acting as a covered person at the time of the incident out of which the suit arose, and a copy of the report shall be sent by the appropriate Federal agency to the responsible Branch Director of the Torts Branch, Civil Division, Department of Justice.
- (c)** A report under this section shall be submitted at the earliest possible date, or within such time as shall be fixed upon request by the United States Attorney or the responsible Branch Director of the Torts Branch.

**28 C.F.R. 15.4- Removal and Defense of Suits**

- (a)** The United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice, is authorized to make the statutory certification that the Federal employee was acting within the scope of his office or

employment with the Federal Government at the time of the incident out of which the suit arose.

**(b)** The United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice, is authorized to make the statutory certification that the covered person was acting at the time of the incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy.

**(c)** A certification under this section may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action. The making, withholding, or withdrawing of certifications, and the removal and defense of, or refusal to remove or defend, such civil actions or proceedings shall be subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division or his or her designee.

**38 CFR part 1 General Provisions: Safeguarding Personal Information in Department of Veterans Affairs Records**

**38 C.F.R. 1.579-Amendment of records**

**(a)** Any individual may request amendment of any Department of Veterans Affairs pertaining to him or her. Not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date or receipt of such request, the Department of Veterans Affairs will acknowledge in writing such receipt.

The Department of Veterans Affairs will complete the review to amend or correct a record as soon as reasonably possible, normally within 30 days from the receipt of the request (excluding Saturdays, Sundays, and legal public holidays) unless unusual circumstances preclude completing action within that time. The Department of Veterans Affairs will promptly either:

- (1)** Correct any part thereof which the individual believes is not accurate, relevant, timely or complete; or
- (2)** Inform the individual of the Department of Veterans Affairs refusal to amend the record in accordance with his or her request, the reason for the refusal, the procedures by which the individual may request a review of that refusal by the Secretary or designee, and the name and address of such official.

(Authority: 5 U.S.C. 552a(d)(2))

**(b)** The administration or staff office having jurisdiction over the records involved will establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the Department of Veterans Affairs of an initial adverse Department of Veterans Affairs determination, and for whatever additional means may be necessary for each individual to be able to exercise fully, his or her right under 5 U.S.C. 552a.

- (1)** Headquarters officials designated as responsible for the amendment of records or information

located in Central Office and under their jurisdiction include, but are not limited to: Secretary; Deputy Secretary, as well as other appropriate individuals responsible for the conduct of business within the various Department of Veterans Affairs administrations and staff offices. These officials will determine and advise the requester of the identifying information required to relate the request to the appropriate record, evaluate and grant or deny requests to amend, review initial adverse determinations upon request, and assist requesters desiring to amend or appeal initial adverse determinations or learn further of the provisions for judicial review.

**(2)** The following field officials are designated as responsible for the amendment of records or information located in facilities under their jurisdiction, as appropriate: The Director of each Center, Domiciliary, Medical Center, Outpatient Clinic, Regional Office, Supply Depot, and Regional Counsels. These officials will function in the same manner at field facilities as that specified in the preceding subparagraph for headquarters officials in Central Office.

(Authority: 5 U.S.C. 552a(f)(4))

**(c)** Any individual who disagrees with the Department of Veterans Affairs refusal to amend his or her record may request a review of such refusal. The Department of Veterans Affairs will complete such review not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual request such review and make a final determination unless, for good cause

shown, the Secretary extends such 30-day period. If, after review, the Secretary or designee also refuses to amend the record in accordance with the request the individual will be advised of the right to file with the Department of Veterans Affairs a concise statement setting forth the reasons for his or her disagreement with the Department of Veterans Affairs refusal and also advise of the provisions for judicial review of the reviewing official's determination. (5 U.S.C. 552a(g)(1)(A))

**(d)** In any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (c) of this section, the Department of Veterans Affairs will clearly note any part of the record which is disputed and provide copies of the statement (and, if the Department of Veterans Affairs deems it appropriate, copies of a concise statement of the Department of Veterans Affairs reasons for not making the amendments requested) to persons or other agencies to whom the disputed record has been disclosed. (5 U.S.C. 552a(d)(4)) (38 U.S.C. 501)

### **38 C.F.R. 1.580- Administrative review**

**(a)** Upon consideration and denial of a request under § 1.577 or § 1.579 of this part, the responsible VA official or designated employee will inform the requester *in writing* of the denial. The adverse determination notice must be signed by the component head or the component's Privacy Officer, and shall include the following:

- (1)** The name and title or position of the person responsible for the adverse determination;
- (2)** A brief statement of the reason(s) for the denial and the policy upon which the denial is based; and
- (3)** Notice that the requester may appeal the adverse determination under paragraph (b) of this section to the Office of General Counsel (providing the address as follows: Office of General Counsel (024), 810 Vermont Avenue NW, Washington, DC 20420), and instructions on what information is required for an appeal, which includes why the individual disagrees with the initial denial with specific attention to one or more of the four standards (*e.g.*, accuracy, relevance, timeliness, and completeness), and a copy of the denial letter and any supporting documentation that demonstrates why the individual believes the information does not meet these requirements.

**(b)** The final agency decision in appeals of adverse determinations described in paragraph (a) of this section will be made by the designated official within the Office of General Counsel (024).

**(c)** A written denial must have occurred to appeal to OGC. The absence of a response to an access *or* amendment request filed with a VA component is *not* a denial. If an individual has not received a response to a request for access to or amendment of records, the individual must pursue the request with the Privacy Officer of the administration office (*e.g.*, the VHA, VBA, or National Cemetery Administration Privacy Officer) or staff office (*e.g.*, the Office of Information Technology

or Office of Inspector General Privacy Staff Officer) that has custody over the records.

**38 CFR part 14 Legal Services, General Counsel, Miscellaneous Claims**

**38 C.F.R. 14.500- Functions and responsibilities of General Counsel**

The General Counsel is responsible to the Secretary for the following:

- (a)** All litigation arising in, or out of, the activities of the Department of Veterans Affairs or involving any employee thereof in his or her official capacity.
- (b)** All interpretative legal advice involving construction or application of laws, including statutes, regulations, and decisional as well as common law.
- (c)** All legal services, advice and assistance required to implement any law administered by the Department of Veterans Affairs.
- (d)** All delegations of authority and professional guidance required to meet these responsibilities.
- (e)** Maintenance of a system of field offices capable of providing legal advice and assistance to all Department of Veterans Affairs field installations and acting for the General Counsel as provided by Department of Veterans Affairs Regulations and instructions, or as directed by the General Counsel in special cases. This includes cooperation with U.S. Attorneys in all civil and criminal cases pertaining to the Department of Veterans Affairs and reporting to the U.S. Attorneys, as authorized, or to the General Counsel, or both, criminal matters coming to the attention of the Regional Counsel.

**(f) Other matters assigned.**

**38 C.F.R. 14.501- Functions and responsibilities of Regional Counsel**

**(a)** Functions and responsibilities of the Regional Counsels are those set forth in this part and all other matters assigned by the General Counsel.

**(b)** In any matter within the jurisdiction of the General Counsel, delegated or otherwise assigned, the Regional Counsel and designated staff attorneys are authorized to conduct investigations, examine witnesses, take affidavits, administer oaths and affirmations and certify copies of public or private documents.

**(c)** The Regional Counsel is authorized to, and shall, under the guidance of the General Counsel, provide legal services, advice and assistance to Department of Veterans Affairs installations within the district assigned. In any area of regulatory, assigned or delegated responsibility, the Regional Counsel may delegate to staff members or other Department of Veterans Affairs attorneys authority to perform, to the extent specified, any legal function under the professional direction of the Regional Counsel. Conversely, the Regional Counsel may modify, suspend, or rescind any authority delegated hereunder.

**(d)** The Regional Counsel is authorized to cooperate with affiliated organizations, legislative committees, and with local and State bar associations to the end that any State law deficiencies relating to Department of Veterans Affairs operations may be removed. No commitment as to proposed legislation

will be made without the approval of the General Counsel.

(e) In any case wherein the Regional Counsel is authorized to take legal action and payment of costs and necessary expenses incident thereto are involved, the administration requesting such action will pay such cost and expenses. Where it is impractical for the Regional Counsel to perform the legal service because of cost, distance, etc., the customary fee for the service rendered by a local attorney employed by the Regional Counsel will be borne by the administration requesting such action.

**38 C.F.R. 14.600(a)(b)- Federal Tort Claims Act-general**

(a) ***Federal Tort Claims Act - overview.*** The Federal Tort Claims Act (28 U.S.C. 1291, 1346, 1402, 2401, 2402, 2411, 2412, and 2671 through 2680) prescribes a uniform procedure for handling of claims against the United States, for money only, on account of damage to or loss of property, or on account of personal injury or death, caused by the negligent or wrongful act or omission of a Government employee while acting within the scope of his or her office or employment, under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred.

(b) ***Applicable regulations.*** The regulations issued by the Department of Justice at 28 CFR part 14 are applicable to claims asserted under the Federal Tort Claims Act, including such claims that are filed with VA. The regulations in §§ 14.600 through 14.605 of this part supplement the regulations at 28 CFR part 14.

**38 C.F.R. 14.604- Filing a claim**

**(a)** Each person who inquires as to the procedure for filing a claim against the United States, predicated on a negligent or wrongful act or omission of an employee of the Department of Veterans Affairs acting within the scope of his or her employment, will be furnished a copy of SF 95, Claim for Damage, Injury, or Death. The claimant will be advised to submit the executed claim directly to the Regional Counsel having jurisdiction of the area wherein the occurrence complained of took place. He or she will also be advised to submit the information prescribed by 28 CFR 14.4 to the extent applicable. If a claim is presented to the Department of Veterans Affairs which involves the actions of employees or officers of other agencies, it will be forwarded to the Department of Veterans Affairs General Counsel, for appropriate action in accord with 28 CFR 14.2.

**(b)** A claim shall be deemed to have been presented when the Department of Veterans Affairs receives from a claimant, his or her duly authorized agent or legal representative, an executed SF 95, or other written notification of an incident, together with a claim for money damages, in a sum certain, for damage to or loss of property or personal injury or death: *Provided, however,* That before compromising or settling any claim, an executed SF 95 shall be obtained from the claimant.

**(c)** A claim presented in compliance with paragraphs (a) and (b) of this section may be amended by the claimant at any time prior to final Department of Veterans Affairs action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed

by the claimant or his or her duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the Department of Veterans Affairs shall have 6 months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of the amendment.

**38 C.F.R. 14.605(a)(1)- Suits against the Department of Veterans Affairs employees arising out of a wrongful act or omission or based upon medical care or treatment furnished in or for the Veterans Health Administration**

**(a)(1)** Section 2679 of title 28 U.S.C., provides that no suit will lie against a Federal employee, or the employee's estate, for damage to property, personal injury, or death resulting from his or her wrongful act or omission while acting within the scope of his or her office or employment with the Federal Government. An action against the United States under 28 U.S.C. 2671-2680 is the exclusive remedy under these circumstances.

**38 CFR part 20: Board of Veterans Appeals: Rules of Practice**

**38 C.F.R. Subpart A: General; 38 CFR 20.1**

**(a) *Purpose.*** These rules establish the practices and procedures governing appeals to the Board of Veterans' Appeals (Board).

**(b) *Construction.*** These rules are to be construed to secure a just and speedy decision in every appeal.

**38 C.F.R. Subpart B: 38 CFR 20.101; Composition of Board, titles.**

**(a)** The Board consists of a Chairman, Vice Chairman, Deputy Vice Chairmen, Members and professional, administrative, clerical and stenographic personnel. Deputy Vice Chairmen are Members of the Board who are appointed to that office by the Secretary upon the recommendation of the Chairman.

**(b)** A Member of the Board (other than the Chairman) may also be known as a Veterans Law Judge. An individual designated as an acting member pursuant to 38 U.S.C. 7101(c)(1) may also be known as an acting Veterans Law Judge.

**38 C.F.R. Subpart D: Evidentiary Record; 38 CFR 20.300(a)**

**(a)** Decisions of the Board will be based on a de novo review of the evidence of record at the time of the agency of original jurisdiction decision on the issue or issues on appeal, and any additional evidence or testimony submitted pursuant to this subpart, as provided in § 20.801.

**38 C.F.R. Subpart K: Vacatur and Reconsideration**

**38 CFR 20.1001: When reconsideration is accorded.**

Reconsideration of an appellate decision may be accorded at any time by the Board of Veterans' Appeals on motion by the appellant or his or her representative or on the Board's own motion:

- (a)** Upon allegation of obvious error of fact or law;
- (b)** Upon discovery of new evidence in the form of relevant records or reports of the service department concerned; or

**(c)** Upon allegation that an allowance of benefits by the Board has been materially influenced by false or fraudulent evidence submitted by or on behalf of the appellant.

**38 CFR 20.1002: Filing and disposition of a motion for reconsideration.**

**(a) *Application requirements*** A motion for reconsideration must be in writing and must include the name of the veteran; the name of the claimant or appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable Department of Veterans Affairs file number; and the date of the Board of Veterans' Appeals decision, or decisions, to be reconsidered. It must also set forth clearly and specifically the alleged obvious error, or errors, of fact or law in the applicable decision, or decisions, of the Board or other appropriate basis for requesting Reconsideration. If the applicable Board of Veterans' Appeals decision, or decisions, involved more than one issue on appeal, the motion for reconsideration must identify the specific issue, or issues, to which the motion pertains. Issues not so identified will not be considered in the disposition of the motion.

**(b) *Filing of motion for reconsideration.*** A motion for reconsideration of a prior Board of Veterans' Appeals decision may be filed at any time. Such motions must be filed at the following address: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038.

**(c) *Disposition.*** The Chairman will review the sufficiency of the allegations set forth in

the motion and, depending upon the decision reached, proceed as follows:

**(1) Motion denied.** The appellant and representative or other appropriate party will be notified if the motion is denied. The notification will include reasons why the allegations are found insufficient. This constitutes final disposition of the motion.

**(2) Motion allowed.** If the motion is allowed, the appellant and his or her representative, if any, will be notified. The appellant and the representative will be given a period of 60 days from the date of mailing of the letter of notification to present additional arguments or evidence. The date of mailing of the letter of notification will be presumed to be the same as the date of the letter of notification. The Chairman will assign a Reconsideration panel in accordance with Rule 1004 (§ 20.1004).

**38 C.F.R. Subpart L: Finality 38 CFR 20.1100; Finality of decisions of the Board**

**(a) General.** All decisions of the Board will be stamped with the date of mailing on the face of the decision. Unless the Chairman of the Board orders reconsideration, and with the exception of matters listed in paragraph (b) of this section, all Board decisions are final on the date stamped on the face of the decision. With the exception of matters listed in paragraph (b) of this section, the decision rendered by the reconsideration Panel in an appeal in which the Chairman has ordered reconsideration is final.

**(b) *Exceptions.*** Final Board decisions are not subject to review except as provided in 38 U.S.C. 1975 and 1984 and 38 U.S.C. chapters 37 and 72. A remand is in the nature of a preliminary order and does not constitute a final decision of the Board.

**38 C.F.R. Subpart M: Privacy Act; 38 CFR 20.1201; Amendment of appellate decisions**

A request for amendment of an appellate decision under the Privacy Act (5 U.S.C. 552a) may be entertained. However, such a request may not be used in lieu of, or to circumvent, the procedures established under Rules 1001 through 1004 (§§ 20.1001-20.1004). The Board will review a request for correction of factual information set forth in a decision. Where the request to amend under the Privacy Act is an attempt to alter a judgment made by the Board and thereby replace the adjudicatory authority and functions of the Board, the request will be denied on the basis that the Act does not authorize a collateral attack upon that which has already been the subject of a decision of the Board. The denial will satisfy the procedural requirements of § 1.579 of this chapter. If otherwise appropriate, the request will be considered one for reconsideration under Rules 1001 through 1004 (§§ 20.1001-20.1004).

**38 C.F.R. Subpart O: Revision Based on Clear and Unmistakable Error**

**38 CFR 20.1400; Motions to revise Board decisions**

**(a)** Review to determine whether clear and unmistakable error exists in a final Board decision may be initiated by the Board, on its own motion, or by a party to that decision (as the term “party” is

defined in Rule 1401(b) (§ 20.1401(b) of this part) in accordance with Rule 1404 (§ 20.1404 of this part).

**(b)** All final Board decisions are subject to revision under this subpart except:

- (1)** Decisions on issues which have been appealed to and decided by a court of competent jurisdiction; and
- (2)** Decisions on issues which have subsequently been decided by a court of competent jurisdiction.

### **38 CFR 20.1401; Definitions**

**(a) *Issue.*** Unless otherwise specified, the term “issue” in this subpart means a matter upon which the Board made a final decision (other than a decision under this subpart). As used in the preceding sentence, a “final decision” is one which was appealable under Chapter 72 of title 38, United States Code, or which would have been so appealable if such provision had been in effect at the time of the decision.

**(b) *Party.*** As used in this subpart, the term “party” means any party to the proceeding before the Board that resulted in the final Board decision which is the subject of a motion under this subpart.

### **38 CFR 20.1402. Inapplicability of other rules.**

Motions filed under this subpart are not appeals and, except as otherwise provided, are not subject to the provisions of part 19 of this title or this part 20 which relate to the processing and disposition of appeals.

### **38 CFR 20.1403. What constitutes clear and unmistakable error; what does not.**

**(a) *General.*** Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error,

of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

**(b) *Record to be reviewed*** -

**(1) *General*.** Review for clear and unmistakable error in a prior Board decision must be based on the record and the law that existed when that decision was made.

**(2) *Special rule for Board decisions on legacy appeals issued on or after July 21, 1992.*** For a Board decision on a legacy appeal as defined in § 19.2 of this chapter issued on or after July 21, 1992, the record that existed when that decision was made includes relevant documents possessed by the Department of Veterans Affairs not later than 90 days before such record was transferred to the Board for review in reaching that decision, provided that the documents could reasonably be expected to be part of the record.

**(c) *Errors that constitute clear and unmistakable error.*** To warrant revision of a Board decision on the grounds of clear and unmistakable error, there must have been an error in the Board's adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable.

**38 CFR 20.1405 Disposition.**

**(a) *Docketing and assignment; notification of representative***

**(1) *General.*** Motions under this subpart will be docketed in the order received and will be assigned in accordance with § 20.106 (relating to assignment of proceedings). Where an appeal is pending on the same underlying issue at the time the motion is received, the motion and the appeal may be consolidated under the same docket number and disposed of as part of the same proceeding. A motion may not be assigned to any Member who participated in the decision that is the subject of the motion. If a motion is assigned to a panel, the decision will be by a majority vote of the panel Members.

**(2) *Advancement on the docket.*** A motion may be advanced on the docket subject to the same substantive and procedural requirements as those applicable to an appeal under Rule 800, paragraph (c) (§ 20.800(c)) or, for legacy appeals, Rule 902, paragraph (c) (§ 20.902(c)).

**(3) *Notification of representative.*** When the Board receives a motion under this subpart from an individual whose claims file indicates that he or she is represented, the Board shall provide a copy of the motion to the representative before assigning the motion to a Member or panel. Within 30 days after the date on which the Board provides a copy of the motion to the representative, the representative may file a relevant response, including a request to review the claims file prior to filing a further response. Upon request made within the time allowed under this paragraph (a)(2), the Board shall

arrange for the representative to have the opportunity to review the claims file, and shall permit the representative a reasonable time after making the file available to file a further response.

**(b) Evidence.** No new evidence will be considered in connection with the disposition of the motion. Material included in the record on the basis of Rule 1403(b)(2) (§ 20.1403(b)(2) of this part) is not considered new evidence.

**(c) Hearing -**

**(1) Availability.** The Board may, for good cause shown, grant a request for a hearing for the purpose of argument. No testimony or other evidence will be admitted in connection with such a hearing. The determination as to whether good cause has been shown shall be made by the member or panel to whom the motion is assigned.

**(2) Submission of requests.** Requests for such a hearing shall be submitted to the following address: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038.

**(d) Referral to ensure completeness of the record.** Subject to the provisions of paragraph (b) of this section, the Board may use the various agencies of original jurisdiction to ensure completeness of the record in connection with a motion under this subpart.

**(e) General Counsel opinions.** The Board may secure opinions of the General Counsel in connection with a motion under this subpart. In such cases, the Board will notify the party and his or her representative, if any. When the opinion is received by the Board, a copy of the opinion will be furnished to the party's

representative or, subject to the limitations provided in 38 U.S.C. 5701(b)(1), to the party if there is no representative. A period of 60 days from the date of mailing of a copy of the opinion will be allowed for response. The date of mailing will be presumed to be the same as the date of the letter or memorandum which accompanies the copy of the opinion for purposes of determining whether a response was timely filed.

**(f) *Decision.*** The decision of the Board on a motion under this subpart will be in writing. The decision will include separately stated findings of fact and conclusions of law on all material questions of fact and law presented on the record, the reasons or bases for those findings and conclusions, and an order granting or denying the motion.

## **FEDERAL RULES OF CIVIL PROCEDURE**

### **Fed.R. Civ. P. 11- Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions**

**(a) SIGNATURE.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) SANCTIONS. (1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee. (2) Motion for Sanctions. A motion for sanctions must be made separately from

any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction: (A) against a represented party for violating Rule 11(b)(2); or (B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned. (6) Requirements for an Order. An order imposing a

sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) INAPPLICABILITY TO DISCOVERY. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

**Fed. R. Civ. P. 12- Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing**

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer: (i) within 21 days after being served with the summons and complaint; or (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United

States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later. (4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;

- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or

ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS. (1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule. (2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES. (1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or (B) failing to either: (i) make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course. (2) When to Raise

**Others.** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised: (A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial. (3) **Lack of Subject-Matter Jurisdiction.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action. (i) **HEARING BEFORE TRIAL.** If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

**DEPARTMENT OF JUSTICE: CIVIL RESOURCE  
MANUAL-36. EFFECT OF DECLARATORY  
JUDGMENT ACT AND ADMINISTRATIVE  
PROCEDURE ACT**

The Congress has enacted a partial waiver of the sovereign immunity defense as to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701, et seq. By Pub.L. No. 94-574, Act of October 21, 1976, 90 Stat. 2721, 5 U.S.C. § 702 was amended to provide that an ("action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.") In addition, 5 U.S.C. § 703 has been amended to allow suit to be brought against the United States or any of its agencies or officers.

The sovereign immunity defense has been withdrawn only with respect to actions seeking specific relief other than money damages, such as an injunction, a declaratory judgment, or a writ of mandamus. *Bowen v. Massachusetts*, 487 U.S. 879 (1988). Specific statutory provisions for the recovery of money damages, such as the Little Tucker Act and the Federal Tort Claims Act, are unaffected. See H.Rep. 94-1656, p. 13, 1976 U.S.Code Cong. & Ad.News 6133.

Another barrier to judicial review of administrative action was removed by section 2 of Pub.L. No. 94-574, which amended 28 U.S.C. § 1331(a) so as to eliminate the \$10,000 amount-in-controversy requirement in actions against the United States, any agency thereof,

or any officer or employee thereof in his official capacity. This provision persuaded the Supreme Court to conclude that, subject to preclusion-of-review statutes, jurisdiction to review agency action is conferred by 28 U.S.C. § 1331, and that the Administrative Procedure Act is not an independent grant of jurisdiction. See *Califano v. Sanders*, 430 U.S. 99, 105-07 (1977).

Similarly, the Declaratory Judgment Act, 28 U.S.C. § 2201, is not an independent source of federal jurisdiction. The purpose of that Act is merely to provide an additional remedy, once jurisdiction is found to exist on another ground. See *Benson v. State Bd. of Parole and Probation*, 384 F.2d 238, 239 (9th Cir. 1967), cert. denied, 391 U.S. 954 (1968); *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). Therefore, where jurisdiction to review a particular agency action under 28 U.S.C. § 1331 has been precluded by another statute, the Declaratory Judgment Act does not provide an independent basis for granting relief.

Source: [www.justice.gov/jm/civil-resource-manual-36-declaratory-judgment-act-and-ada](http://www.justice.gov/jm/civil-resource-manual-36-declaratory-judgment-act-and-ada)