

APPENDIX

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Designated for Electronic Publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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

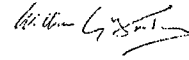
ORDERED that the Court's stamp grant of the appellant's motion to withdraw her petition is REVOKED. It is further

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:

A handwritten signature in black ink, appearing to read "William S. Greenberg", with a stylized flourish at the end.

WILLIAM S. GREENBERG
Judge

Copies to:
Stephanie Michael

VA General Counsel (027)

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

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 Green-
berg.

ON PETITION FOR PANEL REHEARING

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

PER CURIAM.

ORDER

Appellant Stephanie Michael filed a petition for panel
rehearing.

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MICHAEL v. SHULKIN

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The mandate of the court will issue on August 28,
2017.

FOR THE COURT

August 21, 2017

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner
Clerk of Court

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

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 Green-
berg.

Decided: June 12, 2017

STEPHANIE MICHAEL, Houston, TX, pro se.

MARIANA 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 De-
partment 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.

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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. Derwinski*, 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 “mischaracteriz[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

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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 Mokai 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



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

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

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

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 through 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 the VA General Counsel by any of the following means: (1) you may mail your request to the Department of Veterans Affairs, General Counsel (021B), 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 e-mail your request to OGC.torts@mail.va.gov. To be timely filed, VA must receive this request prior to the expiration of 6 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 the filing of any such request for reconsideration (28 C.F.R. Section 14.9).

ATTACHMENT A

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,



Andrée Boudreaux
Regional Counsel

AB/dhl



**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

*625 Indiana Avenue NW, Suite 900
Washington, DC 20004*

September 1, 2016

Ms. Stephanie Michael
PO 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 here 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,

AP Stygles

Anne P. Stygles
Chief Deputy Clerk of Operations

ATTACHMENT B

App.14a
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

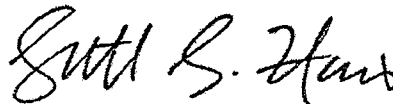
Re: Stephanie Michael
v. United States
No. 15-8283

Dear Ms. Michael:

The Court today entered the following order in the above-entitled case:

The petition for rehearing is denied.

Sincerely,



Scott S. Harris, Clerk

ATTACHMENT B

App.15a

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

United States Court of Appeals
Fifth Circuit

FILED

September 17, 2015

Lyle W. Cayce
Clerk

No. 15-20108
Summary Calendar

STEPHANIE MICHAEL,

Plaintiff–Appellant,

v.

UNITED STATES OF AMERICA,

Defendant–Appellee.

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

Before KING, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Stephanie Michael, a veteran of the U.S. 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. The Government filed a motion to dismiss. The district

* 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. R. 47.5.4.

App.16a

No. 15-20108

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.¹ This court has held:

The preclusive effect of a prior federal 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 action concluded with a final judgment on the merits; and 4) the same claim or cause of action is involved in both suits.²

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

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.⁴ 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.⁵

¹ *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).

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

³ *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).

⁴ Order Adopting Magistrate Judge's Memorandum & 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. Tex. Feb. 11, 2013), ECF No. 23; R. at 32-42.

⁵ *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 (5th Cir. 1979))).

App.17a

No. 15-20108

The district court dismissed the present action “with prejudice to refile in the United States District Courts.” The Veterans’ Judicial Review Act “created an exclusive review procedure by which veterans may resolve their disagreements with the Department of Veterans Affairs.”⁶ 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.⁷ The Federal Circuit Court of Appeals has exclusive jurisdiction to review the decisions of the Court of Veterans’ Appeals.⁸ Because Michael “challenges the VA’s decision to deny [her] benefits, the district court does not have jurisdiction” over her complaint.⁹

The judgment of the district court is AFFIRMED.

⁶ *Zuspan v. Brown*, 60 F.3d 1156, 1158 (5th Cir. 1995).

⁷ *Id.* at 1158-59.

⁸ *Id.* at 1159.

⁹ *Id.* at 1158.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

STEPHANIE MICHAEL,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

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CIVIL ACTION H-14-2421

DISMISSAL ORDER

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-3093.¹ 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

¹ 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).

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.

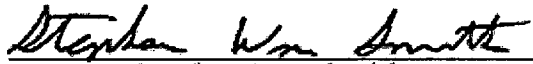
The doctrine of res judicata bars Michael's litigation of her claims in this court. The elements of res judicata are: (1) the parties are identical; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) 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).

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.


Stephen Wm Smith
United States Magistrate Judge

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

U.S. Const. 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.

U.S. Const. 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.

U.S. Const. Fifth Amendment, Due Process Clause

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

Privacy Act of 1974

5 U.S.C. §552a(g) provides:

(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 the 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.

Administrative Procedure Act

5 U.S.C. §701 provides:

(a) 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 them by section 551 of this title.

5 U.S.C. §702 provides:

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 provides:

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. §704 provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. §705 provides:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. §706 provides:

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. §451 provides:

As used in this title:

The term “court of the United States” includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The terms “district court” and “district court of the United States” mean the courts constituted by chapter 5 of this title.

The term “judge of the United States” includes judges of the courts of appeals, district courts, Court of International Trade and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior.

The term “justice of the United States” includes the Chief Justice of the United States and the associate justices of the Supreme Court.

The terms “district” and “judicial district” means the districts enumerated in Chapter 5 of this title.

The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

28 U.S.C. §516 provides:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. §1346(b) provides:

(b)(1) 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.

All Writs Act

28 U.S.C. §1651 provides:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Declaratory Judgment Act

28 U.S.C. §2201 provides:

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section

516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

Federal Tort Claims Act

28 U.S.C. §2671 provides:

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. §2672 provides:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States 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 agency 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: *Provided*, That any award, compromise, or

settlement in excess of \$25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of \$2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of \$2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. §2673 provides:

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

28 U.S.C. §2674 provides:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. §2675 provides:

(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. §2676 provides:

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter,

against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. §2677 provides:

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

28 USC §2678 provides:

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than \$2,000 or imprisoned not more than one year, or both.

28 U.S.C. §2679 provides:

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)

(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)

(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) [1] of the Federal Rules of Civil Procedure. In the event the petition is filed in

a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 USC §2680 provides:

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.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

- (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
- (2) the interest of the claimant was not forfeited;
- (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
- (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..
- (d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.
- (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.
- (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

Department of Veterans Affairs Codification Act of 1991

38 U.S.C. §511 provides:

- (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.

Veterans Judicial Review Act of 1988

38 U.S.C. §7251 provides:

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 provides:

- (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. §7253 provides:

(a)COMPOSITION.—

The Court of Appeals for Veterans Claims is composed of at least three and not more than seven judges, one of whom shall serve as chief judge in accordance with subsection (d).

(b)APPOINTMENT.—

The judges of the Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. A person may not be appointed to the Court who is not a member in good standing of the bar of a Federal court or of the highest court of a State. Not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.

(c)TERM OF OFFICE.—

The term of office of the judges of the Court of Appeals for Veterans Claims shall be 15 years. A judge who is nominated by the President for appointment to an additional term on the Court without a break in service and whose term of office expires while that nomination is pending before the Senate may continue in office for up to 1 year while that nomination is pending.

(d)CHIEF JUDGE.—

(1)The chief judge of the Court is the head of the Court. The chief judge of the Court shall be the judge of the Court in regular active service who is senior in commission among the judges of the Court who—

(A)have served for one or more years as judges of the Court;

(B)have at least 3 years remaining in term of office; and

(C)have not previously served as chief judge.

(2)(A) In any case in which there is no judge of the Court in regular active service who meets the requirements under paragraph (1), the judge of the Court in regular active service who is senior in commission and meets subparagraph (A) or (B) and subparagraph (C) of paragraph (1) shall act as the chief judge.

(B) In any case under subparagraph (A) of this paragraph in which there is no judge of the Court in regular active service who meets subparagraph (A) or (B) and subparagraph (C) of paragraph (1), the judge of the Court in regular active service

who is senior in commission and meets subparagraph (C) shall act as the chief judge.

(3) Except as provided in paragraph (4), a judge of the Court shall serve as the chief judge under paragraph (1) for a term of five years or until the judge becomes age 70, whichever occurs first. If no other judge is eligible under paragraph (1) to serve as chief judge upon the expiration of that term, that judge shall continue to serve as chief judge until another judge becomes eligible under that paragraph to serve as chief judge.

(4)(A) The term of a chief judge shall be terminated before the end of the term prescribed by paragraph (3) if—

(i) the chief judge leaves regular active service as a judge of the Court; or

(ii) the chief judge notifies the other judges of the Court in writing that such judge desires to be relieved of the duties of chief judge.

(B) The effective date of a termination of the term under subparagraph (A) shall be the date on which the chief judge leaves regular active service or the date of the notification under subparagraph (A)(ii), as the case may be.

(5) If a chief judge is temporarily unable to perform the duties of chief judge, those duties shall be performed by the judge of the Court in active service who is present, able and qualified to act, and is next in precedence.

(6) Judges who have the same seniority in commission shall be eligible for service as chief judge in accordance with their relative precedence.

(e) SALARY.—Each judge of the Court shall receive a salary at the same rate as is received by judges of the United States district courts.

(f) REMOVAL.—(1)

A judge of the Court may be removed from office by the President on grounds of misconduct, neglect of duty, engaging in the practice of law, or violating section 7255(c) of this title. A judge of the Court may not be removed from office by the President on any other ground.

(2) Before a judge may be removed from office under this subsection, the judge shall be provided with a full specification of the reasons for the removal and an opportunity to be heard.

(g) RULES.—(1)

The Court shall prescribe rules, consistent with the provisions of chapter 16 of title 28, establishing procedures for the filing of complaints with respect to the conduct of any judge of the Court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, the Court shall have the powers granted to a judicial council under such chapter.

(2) The provisions of sections 354(b) through 360 of title 28, regarding referral or certification to, and petition for review in, the Judicial Conference of the United States and action thereon, shall apply to the exercise by the Court of the powers of a judicial council under paragraph (1) of this subsection. The grounds for removal from office specified in subsection (f)(1) shall provide a basis for a determination

pursuant to section 354(b) or 355 of title 28, and certification and transmittal by the Conference shall be made to the President for consideration under subsection (f).

(3)(A) In conducting hearings pursuant to paragraph (1), the Court may exercise the authority provided under section 1821 of title 28 to pay the fees and allowances described in that section.

(B) The Court shall have the power provided under section 361 of title 28 to award reimbursement for the reasonable expenses described in that section. Reimbursements under this subparagraph shall be made from funds appropriated to the Court.

(h) TEMPORARY EXPANSION OF COURT.—

(1) During the period from January 1, 2002, through August 15, 2005, the authorized number of judges of the Court specified in subsection (a) is increased by two.

(2)(A) Of the two additional judges authorized by this subsection—

(i) only one may be appointed pursuant to a nomination made in 2002; and

(ii) only one may be appointed pursuant to a nomination made in 2003.

(B) If a judge is not appointed under this subsection pursuant to a nomination made in 2002, a judge may be appointed under this subsection pursuant to a nomination made in 2004. If a judge is not appointed under this subsection pursuant to a nomination made in 2003, a judge may be appointed under this subsection pursuant to a nomination made in 2004. In either case, such an appointment may be made only pursuant to a nomination made before October 1, 2004.

(3) The term of office and the eligibility for retirement of a judge appointed under this subsection, other than a judge described in paragraph (4), are governed by the provisions of section 1012 of the Court of Appeals for Veterans Claims Amendments of 1999 (title X of Public Law 106–117; 113 Stat. 1590; 38 U.S.C. 7296 note) if the judge is one of the first two judges appointed to the Court after November 30, 1999.

(4) A judge of the Court as of December 27, 2001, who was appointed to the Court before January 1, 1991, may accept appointment as a judge of the Court under this subsection notwithstanding that the term of office of the judge on the Court has not yet expired under this section. The term of office of an incumbent judge who receives an appointment as described in the preceding sentence shall be 15 years, which includes any period remaining in the unexpired term of the judge. Any service following an appointment under this subsection shall be treated as though served as part of the original term of office of that judge on the Court.

(5) Notwithstanding paragraph (1), an appointment may not be made to the Court if the appointment would result in there being more than seven judges on the Court who were appointed after January 1, 1997. For the purposes of this paragraph, a judge serving in recall status under section 7257 of this title shall be disregarded in counting the number of judges appointed to the Court after such date.

(i) ADDITIONAL TEMPORARY EXPANSION OF COURT.—

(1) Subject to paragraph (2), effective as of December 31, 2009, the authorized number of judges of the Court specified in subsection (a) is increased by two.

(2) Effective as of January 1, 2021, an appointment may not be made to the Court if the appointment would result in there being more judges of the Court than the authorized number of judges of the Court specified in subsection (a).

38 U.S.C. §7261 provides:

(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 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.

38 U.S.C. §7292 provides:

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

(b)(1)

When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d) (1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The

court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds 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.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals 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.

(e)(1)

Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules for review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.

VA Regulations

38 CFR § 1.579 Amendment of records.

(a) Any individual may request amendment of any Department of Veterans Affairs record pertaining to him or her. Not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of 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 CFR §14.505 Submissions

All submissions will set forth the question of law on which the opinion is desired, together with a complete and accurate summary of relevant facts. Files, correspondence, and other original papers will not be submitted unless pertinent portions thereof cannot practicably be summarized or copies made and attached as exhibits.

38 CFR § 14.600 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.

(c)*Delegations of authority concerning claims.* Subject to the limitations in 28 CFR 14.6(c), (d), and (e), authority to consider, ascertain, adjust, determine, compromise, and settle claims asserted under the Federal Tort Claims Act (including the authority to execute an appropriate voucher and other necessary instruments in connection therewith) is delegated as follows:

(1) To the Under Secretary for Health, the Deputy Under Secretary for Health, Veterans Integrated Service Network (VISN) Directors, and VA Medical Facility Directors; with respect to any claim for \$2,500 or less that arises out of the operations of the Veterans Health Administration.

(2) To the General Counsel, Deputy General Counsel, and Assistant General Counsel (Professional Staff Group I) or those authorized to act for them with respect to any claim; provided that any award, compromise, or settlement in excess of \$300,000 shall be effected only with the prior written approval of the Attorney General or his or her designee; provided further that whenever a settlement is effected in an amount in excess of \$100,000, a memorandum fully explaining the basis for the action taken shall be sent to the Department of Justice.

(3) To the Regional Counsels and the Deputy Assistant General Counsel (Professional Staff Group I) or those authorized to act for them with respect to any claim, provided that:

(i) Any award, compromise, or settlement in excess of \$150,000 but not more than \$300,000 shall be effected only with the prior written approval of the General Counsel, Deputy General Counsel, or Assistant General Counsel (Professional Staff Group I); provided further that whenever a settlement is effected in an amount in excess of \$100,000, a memorandum fully explaining the basis for the action taken shall be sent to the Department of Justice; and

(ii) Any award where, for any reason, the compromise of a particular claim, as a practical matter, will, or may control the disposition of a related claim in which the amount to be paid may exceed \$150,000 shall be effected only with the prior written approval of the General Counsel, Deputy General Counsel, or Assistant General Counsel (Professional Staff Group I); and

(iii) Any award, compromise, or settlement in excess of \$300,000 shall be effected only with the prior written approval of the General Counsel, Deputy General Counsel, or Assistant General Counsel (Professional Staff Group I) and with the prior written approval of the Attorney General or his or her designee.

(d) *Delegations of authority to reconsider final denial of a claim.* Subject to the limitations in 28 CFR 14.6(c), (d), and (e), authority under 28 CFR 14.9 to reconsider final denials of claims under the Federal Tort Claims Act is delegated as follows:

(1) To the Regional Counsel with jurisdiction over the geographic area where the occurrence complained of arose, with respect to any claim for \$2,500 or less that arises out of the operations of the Veterans Health Administration.

(2) To the General Counsel, Deputy General Counsel, and Assistant General Counsel (Professional Staff Group I) with respect to any claim; provided that any award, compromise, or settlement in excess of \$300,000 shall be effected only with the prior written approval of the Attorney General or his or her designee; provided further that whenever a settlement is effected in an amount in excess of \$100,000, a memorandum fully explaining the basis for the action taken shall be sent to the Department of Justice.

38 CFR § 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 CFR § 14.605 Suits against Department of Veterans Affairs employees arising out of a wrongful act or omission or based upon medical care and 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.

(2) Section 7316 of title 38 U.S.C., provides that (i) where there is remedy against the United States under 28 U.S.C. 2671- 2680, or (ii) where proceedings for compensation or other benefits from the United States are provided by law, and the availability of such benefits precludes a remedy under 28 U.S.C.2671- 2680 (as is the case, for example, in the Federal Employees' Compensation Act, 5 U.S.C. 8101, *et seq.*), such recourse is the exclusive remedy for property damage, personal injury, or death allegedly occurring as a result of malpractice or negligence committed by a physician, dentist, nurse, physician's assistant, dentist's assistant, pharmacist or paramedical (for example, medical and dental technicians, nursing assistants, and therapists), or other supporting personnel, while furnishing medical care and treatment in the exercise of duties in or for the

Veterans Health Administration. Accordingly, a malpractice or negligence suit for property damage, personal injury, or death will not lie against such personnel under the circumstances set forth in this subparagraph.

(b) The Department of Justice will defend any civil action or proceeding brought in any court against persons referred to in paragraph (a) (1) or (2) of this section under the circumstances set forth therein. Accordingly, when a suit is filed against any employee of the Department of Veterans Affairs as a result of a wrongful act or omission arising out of employment with the Government, or as a result of furnishing medical or dental care and treatment in or for the Veterans Health Administration, the employee shall immediately forward a copy of all papers served on him or her to the Regional Counsel having jurisdiction over the area in which the employee works. The employee will also promptly forward to the appropriate Regional Counsel a signed statement indicating whether he or she desires the Department of Justice to provide representation, and to otherwise protect his or her interests as provided for by law. Even though there may not have been service, if an employee learns that a suit arising from either of the above-described circumstances has been filed against him or her, the employee shall immediately so advise the appropriate Regional Counsel, provide the Regional Counsel with a brief description of the facts involved, and state whether he or she desires Federal intervention.

(c) Upon receipt of notice that suit has been filed against an employee of the Department of Veterans Affairs who is entitled to protection under 28 U.S.C. 2679 or 38 U.S.C. 7316, the Regional Counsel having jurisdiction over the place where the employee works will conduct a preliminary investigation, which will include an affidavit by the employee's supervisor as to whether the defendant-employee was acting in the scope of his or her employment at the time of the incident, and a request from the defendant-employee for representation. The affidavit will contain a factual description of the employee's duties and responsibilities at the time of the incident and should describe the incident in question. Upon receipt of such information, the Regional Counsel will make a preliminary determination as to whether such suit comes within the provisions of either 28 U.S.C. 2679 or 38 U.S.C. 7316. The Regional Counsel will refer the matter to the appropriate U.S. Attorney with a recommendation as to whether the employee is eligible for protection under 28 U.S.C. 2679 or 38 U.S.C. 7316. The U.S. Attorney will decide whether the Department of Veterans Affairs employee is eligible for the protection. The Regional Counsel will submit to the General Counsel a preliminary report in duplicate containing the information furnished the U.S. Attorney. In all such cases, the Regional Counsel will conduct a complete investigation of the facts and law. Two copies of the investigation report will be sent to the General Counsel and one copy will be sent to the appropriate U.S. Attorney. The General Counsel, through the Regional Counsel, will keep the employee advised of the action being taken concerning the suit. In the event that the U.S. Attorney or the Department of Justice determines that the employee is not eligible for immunization pursuant to one of the aforementioned provisions,

the General Counsel's office, through the Regional Counsel, will advise the employee and will call to his or her attention the discretionary conditional indemnification provisions of section 7316(e) of title 38 U.S.C.

(d) Where a civil action is commenced in a State court against a Department of Veterans Affairs employee, and the matter is within the purview of either 28 U.S.C. 2679, or 38 U.S.C. 7316, the Department of Justice will be asked to remove such suit to the appropriate Federal District Court before trial, where it will be deemed an action against the United States. The defendant employee will be dismissed from the suit. After such removal, the United States has available all defenses to which it would have been entitled if the action had originally been commenced against the United States in the proper Federal District Court. Should a Federal District Court determine that the Department of Veterans Affairs employee whose acts or omissions gave rise to the suit was not acting within the scope of his or her office or employment, and therefore not eligible for immunization as provided for in the aforementioned section, the case will be remanded to the State court from which it was removed, the employee will be reinstated as the defendant, and the United States will be dismissed from the suit. Where the employee has been rein stated as the defendant under such circumstances, in order to protect any rights which he or she may have under 38 U.S.C. 7316(e), he or she shall immediately notify the General Counsel, through the local Regional Counsel. Through the Regional Counsel, the General Counsel will call the employee's attention to the discretionary conditional indemnification provisions of section 7316(e).

(e) Under the authority of 38 U.S.C. 7316(e), the Secretary of Veterans Affairs may pay for monetary damages sustained by or assessed against an individual (or his or her estate) described in paragraph (a)(2) of this section, as the result of any suit instituted against such individual which is not cognizable under the provisions of 28 U.S.C. 2671- 2680 because the individual was assigned to a foreign country, the said individual was detailed to a State or political division thereof, or the cause of action was specifically excluded under the provisions of 28 U.S.C. 2680(h); *Provided*, That the amount of damages sustained is reasonable when compared with similar cases, litigated or settled, and the United States was given a reasonable opportunity to defend such individual and to participate in settlement negotiations.

38 CFR § 20.1201 Rule 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 1000 through 1003 (§§ 20.1000-20.1003 of this part). 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 1000 through 1003 (§§ 20.1000-20.1003 of this part).

Federal Rules of Civil Procedure 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.