No. 23-779

In the Supreme Court of the United States

DAVID FORSYTHE, PETITIONER

v.

DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In the version of 38 U.S.C. 5103(a)(1) that was effective until 2012, Congress instructed that, "*[u]pon receipt of a complete or substantially complete application*, the Secretary [of Veterans Affairs] shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." 38 U.S.C. 5103(a) (Supp. II 2008) (emphasis added). In 2012, Congress deleted the introductory phrase ("[u]pon receipt of a complete or substantially complete application") and added a directive that the notice should be made "by the most effective means available, including electronic communication or notification in writing." Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 504(a)(1), 126 Stat. 1191. In accordance with that statute, the Department of Veterans Affairs (VA) subsequently began to utilize a benefits claim form that includes a notice, which the veteran receives at the outset of the application process, advising the veteran of the elements of a claim and the types of information and evidence necessary to substantiate a claim. The questions presented are as follows:

1. Whether the current version of 38 U.S.C. 5103(a)(1) permits the VA to provide notice to a veteran on the claim form, rather than after the veteran's claim has been received.

2. Whether, even if the VA is required to provide notice after receipt of a claim, the court of appeals permissibly determined that any error in providing notice too early was harmless in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not published in the Federal Reporter but is available at 2023 WL 2638319. The opinion of the United States Court of Appeals for Veterans Claims (Pet. App. 20a-33a) is not reported but is available at 2021 WL 3878978. The opinion of the Board of Veterans' Appeals (Pet. App. 34a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2023. A petition for rehearing was denied on September 5, 2023 (Pet. App. 49a-51a). On October 17, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 16, 2024, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) administers a federal program that provides benefits to veterans with disabilities incurred in or aggravated by military service. 38 U.S.C. 1110; see *Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011). In order to receive such benefits, a veteran must submit a claim to the VA. 38 U.S.C. 5101(a)(1)(A). The VA must provide notice to veterans of "any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate" a claim for benefits. 38 U.S.C. 5103(a)(1).

Until 2012, Section 5103(a) required the VA to provide this notice "[u]pon receipt of a complete or substantially complete application." 38 U.S.C. 5103(a) (Supp. II 2008). In 2001, when that version of Section 5103(a)(1) was in effect, the VA promulgated 38 C.F.R. 3.159(b)(1). See 66 Fed. Reg. 45,620, 45,622-45,623 (Aug. 29, 2001). That regulation states that, "[w]hen VA receives a complete or substantially complete" application for benefits, it "will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim." 38 C.F.R. 3.159(b)(1) (2002); accord 38 C.F.R. 3.159(b)(1) (2022).

In 2012, Congress amended Section 5103(a) to remove the language requiring notice "[u]pon receipt" of an application. See Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 504(a)(1), 126 Stat. 1191 (Honoring America's Veterans Act). That amendment also added a requirement that the notice should be made "by the most effective means available, including electronic

communication or notification in writing." § 504(a)(1), 126 Stat. 1191. Section 5103(a)(1) now provides, in relevant part, that "the Secretary shall provide to the claimant and the claimant's representative, if any, by the most effective means available, including electronic communication or notification in writing, notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." 38 U.S.C. 5103(a)(1).

After the 2012 change to 38 U.S.C. 5103(a), the VA stated in a notice of proposed rulemaking that, "[t]o the extent there is any inconsistency between the VA's current notice and assistance rules and the current statute as amended by [the Honoring America's Veterans Act], the statute clearly governs." 78 Fed. Reg. 65,490, 65,495 (Oct. 31, 2013). The rulemaking proposal also noted that the VA was "examining whether 38 CFR 3.159 should be amended to account for the new statute, but believes the statute is clear authority for the changes affecting how VA provides notice that we propose here." *Ibid.* The VA did not ultimately amend the language of Section 3.159. See 38 C.F.R. 3.159.

2. From 1987 to 1990, petitioner served on active duty in the U.S. Navy. Pet. App. 2a. In February 1988, he suffered a contusion to his left shoulder after a fall. *Ibid.* X-rays taken at the time showed no dislocation or other injury. *Ibid.* Petitioner was prescribed Motrin, and the condition resolved by the following month. *Ibid.* Petitioner's 1990 separation examination report showed no residual shoulder conditions. *Ibid.* At a 1993 examination, petitioner reported that he had no issues with his left shoulder. *Ibid.*

In March 2019, almost 30 years after his separation from the Navy, petitioner visited a private physician for

left-shoulder pain and dysfunction. Pet. App. 3a. Petitioner reported that he had injured his shoulder during military service by lifting a 60-pound generator onto a helicopter. *Ibid.* On the basis of petitioner's statement, the private physician determined that petitioner's injury was more likely than not related to his service. *Ibid.* Petitioner's service records do not reflect that petitioner received medical care for a shoulder injury resulting from lifting a generator. *Ibid.*

Petitioner used VA Form 21-526EZ (Application for Disability Compensation and Related Compensation Benefits) to submit a claim for VA disability benefits for a left-shoulder condition. Pet. App. 3a. Along with that application form, the VA had provided petitioner a separate document entitled "Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits" (Notice Form). *Ibid.* (citation omitted). That Notice Form "explained what a veteran needed to do to submit a claim, described the information and evidence the veteran needed to submit based on the claim processing chosen by the veteran, described how VA would help the veteran obtain evidence for his or her claim, provided a guide to what the evidence must show to support the claim, and described the ways to submit information and evidence by mail, fax, and/or online." *Id.* at 32a n.3; see C.A. App. 89-95 (reproducing the Notice Form the VA was using in September 2019). Petitioner signed a certification confirming that he had "received the notice attached to this application." Pet. App. 3a (citation omitted). In support of his application, petitioner submitted the 2019 medical report and opinion from the private physician, as well

as a statement identifying the evidence he was submitting in support of his claim. See *ibid.*

The VA subsequently performed a medical examination on petitioner and determined that his shoulder condition was less likely than not related to his service. See Pet. App. 3a. After considering the VA examination, petitioner's service treatment records, and the private medical examination, the VA denied petitioner's claim of service connection for the left-shoulder disability. See *id.* at 3a-4a.

3. In a nonprecedential opinion, the Board of Veterans' Appeals (Board) denied petitioner's claim of service connection as to the shoulder injury at issue here. Pet. App. 34a; see *id.* at 34a-48a. The Board found petitioner competent to report his current diagnosis and to report that he had experienced symptoms since service. *Id.* at 40a. But it emphasized that petitioner's "June 1990 separation examination and March 1993 service examination reveal normal left shoulder findings," and that "on his March 1993 report of medical history, [petitioner] denied left shoulder symptoms." *Ibid.* The Board further found that petitioner's evidence "d[id] not outweigh the opinion of the VA examiner"—"a skilled neutral professional"—"who provided a thorough examination of [petitioner], considered his medical history and thereafter indicated that [petitioner's] current left shoulder disability is not related to service." *Ibid.*

Accordingly, the Board determined that "the more credible and probative evidence establishes that [petitioner's] current left shoulder disability was not manifest during service." Pet. App. 40a. It found that "the preponderance of the evidence is against the Veteran's claim of entitlement to service connection" for that disability. *Ibid.* The Board remanded to the VA to obtain

additional records and to further consider service connection for several other disabilities asserted by petitioner that are not at issue here. *Id.* at 40a-45a.

4. The United States Court of Appeals for Veterans Claims (Veterans Court) affirmed the Board's decision in a nonprecedential opinion. Pet. App. 20a-33a.

At the outset, the Veterans Court determined that the Board's factual findings were adequately explained and not clearly erroneous. Pet. App. 24a-31a. The Veterans Court emphasized that the Board and the VA examiner had not "impermissibly ignored the veteran's assertion of an in-service injury based upon the absence of a contemporaneous medical report," but instead had relied on "the factual finding that [petitioner] had no shoulder issues in 1990 and 1993." *Id.* at 28a. The Veterans Court further explained that, because the Board had determined that the preponderance of the evidence weighed against petitioner's claim—rather than being approximately in equipoise—the Secretary was not obligated to give the benefit of the doubt to petitioner. *Id.* at 32a-33a.

The Veterans Court then rejected petitioner's argument that the VA had breached its duty to assist under 38 U.S.C. 5103(a) and 38 C.F.R. 3.159(b)(1) by providing petitioner inadequate notice regarding what evidence was required to substantiate his claim. Pet. App. 31a-32a. The court explained that the VA had satisfied the pre-decision notice requirements by including with the application form a notice that contained all required information. *Id.* at 32a. The Veterans Court emphasized that, under longstanding Federal Circuit precedent, the VA is required to provide only "generic notice" rather than an individualized explanation of the specific

evidence required in each case. *Ibid.* (quoting *Wilson* v. *Mansfield*, 506 F.3d 1055, 1059-1060 (Fed. Cir. 2007)).

5. The court of appeals affirmed in a nonprecedential opinion. Pet. App. 1a-12a; see *id.* at 13a-19a (Mayer, J., dissenting).

a. The court of appeals first held that the VA was not required to wait until petitioner had submitted a claim before providing the requisite notice. Pet. App. 6a-8a. The court explained that, in its current form, Section 5103(a) does not specify that the VA must provide notice of the evidence necessary to substantiate a claim *after* that claim is filed. *Id.* at 6a. Instead, the statute requires the VA to provide notice "by the most effective means available," with no reference to the timing of that notice relative to the receipt of a veteran's application. *Ibid.* The court observed that Congress had amended Section 5103(a) in 2012 to "remove[] the requirement that the agency provide notice *after* receiving a complete or substantially complete application from the claimant," and that it had done so "following testimony from the [VA] about the inefficiencies of providing notice after a claim was filed." *Id.* at 6a-7a.

The court of appeals next observed that the VA regulation implementing the statute, 38 C.F.R. 3.159(b)(1), continues to refer to the VA as providing notice "when [it] receives a complete or substantially complete initial or supplemental claim." Pet. App. 8a (brackets, citation, and emphasis omitted). The court explained, however, that the regulatory language "is outdated," and the court found it "unlikely that the agency intended to independently re-impose the very temporal limit that Congress repealed." *Id.* at 9a. The court concluded that, because there was "no prejudicial error from sending the notice too early," it was unnecessary "to decide

whether the regulation imposes an independent temporal requirement." *Id.* at 9a n.1. The court "urge[d] the Secretary to amend this regulation," however, in order "[t]o avoid further confusion." *Ibid.*

The court of appeals then determined that any error that the VA may have made in providing the notice too early was harmless. Pet. App. 9a-11a. The court first explained that, under governing circuit precedent, "[t]he content of the notice [petitioner] received was sufficient as a matter of law" because "'only generic notice'" rather than "an individually tailored evidentiary notice" is required. *Id.* at 9a-10a (quoting *Wilson*, 506 F.3d at 1059-1060). The court therefore rejected petitioner's contention that, if the VA had provided the requisite notice *after* petitioner had submitted his benefits application, petitioner would have received "an individualized notice tailored to his claim." *Id.* at 10a. The court then observed that petitioner had not explained how "receiving the evidentiary notice *too early*" could have "prevented him from collecting and submitting the evidence he had" or "from filing a supplemental claim and asking the agency to gather evidence from other private providers." *Id.* at 10a-11a. For that reason, the court "s[aw] no circumstance in which there could have been prejudicial error resulting from [petitioner] receiving the notice too early" in this case. *Id.* at 11a.

b. Judge Mayer dissented. Pet. App. 12a-19a. He would have held that 38 C.F.R. 3.159(b)(1) required the VA to provide notice after the VA received petitioner's claim for benefits, and that the VA had erred by instead providing the notice at the start of the claims process. Pet. App. 14a; see *id.* at 14a-17a. Judge Mayer also indicated that he saw "significant questions" about the sufficiency of the contents of the VA's standard Notice

Form under the standards set out in prior Federal Circuit decisions, but he did not reach a conclusion regarding the sufficiency of the form. *Id.* at 17a; see *id.* at 17a-18a. Judge Mayer did not address the harmless-error question. See *id.* at 12a-19a.

6. The court of appeals denied a petition for rehearing and rehearing en banc, with no noted dissents. Pet. App. 49a-51a.

ARGUMENT

The courts below correctly rejected petitioner's contention that the VA provided legally insufficient notice of the evidence he should submit in support of his disability claim. Nothing in 38 U.S.C. 5103(a) precluded the VA from providing the required notice before rather than after the agency received petitioner's application. To the contrary, in 2012 Congress amended Section 5103(a) to increase the agency's discretion to determine when such notice can most efficaciously be provided. And in its nonprecedential opinion, the court of appeals correctly held that, even if the VA's regulation required petitioner's sequencing, any error in providing the notice too early was harmless in this case.

Petitioner contends that, under the statute and the VA rule that implements the notice requirement, the agency must assess a veteran's initial benefits application and *then* provide the veteran with *individualized* notice of the further evidence needed to substantiate his claim. The court of appeals correctly rejected that argument, relying on longstanding Federal Circuit precedent holding that only "generic" notice is required. Pet. App. 10a (quoting *Wilson* v. *Mansfield*, 506 F.3d 1055, 1059-1060 (Fed. Cir. 2007)). Further review is not warranted.

1. This case does not satisfy the Court's usual criteria for review. The court of appeals' decision is unreported and nonprecedential. Petitioner does not assert that any circuit conflict exists, and the decision below does not conflict with any decision of this Court. The Federal Circuit declined to reconsider the decision en banc, with no judge in active service dissenting from that denial or calling for a vote.

2. The courts below correctly held that, in its current form, Section 5103(a) allows the VA to provide notice to a veteran about requirements for substantiating a claim for service-connected disability benefits *before* receiving the veteran's substantially completed benefits application.

a. Section 5103(a) states, in relevant part, that "the Secretary shall provide to the claimant and the claimant's representative, if any, by the most effective means available, including electronic communication or notification in writing, notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." 38 U.S.C. 5103(a)(1). Nothing in that language requires the VA to provide notice after a claim has been received.

Section 5103(a)(1)'s drafting history reinforces that conclusion. Before 2012, Section 5103(a) required the VA to provide notice "[u]pon receipt of a complete or substantially complete application." 38 U.S.C. 5103(a) (Supp. II 2008); see *ibid.* ("Upon receipt of a complete or substantially complete application, the Secretary [of Veterans Affairs] shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim."). In 2012, Congress removed the introductory

phrase "[u]pon receipt of a complete or substantially complete application" and added a directive that the notice should be made "by the most effective means available, including electronic communication or notification in writing." Honoring America's Veterans Act § 504(a)(1), 126 Stat. 1191.

A House Committee Report discussing the proposed language explained that it "would remove the requirement that the [notice] be sent only after receipt of a claim, thereby allowing VA to put notice on new claims forms" and encouraging veterans "to take additional time to find, procure, and submit private medical evidence before submitting their claim." H.R. Rep. No. 241, 112th Cong., 1st Sess. 9 (2011) (House Report) (addressing H.R. 2349); see 158 Cong. Rec. 11,551 (2012) (joint explanatory statement indicating that the final amendment reflected provisions of several bills, including H.R. 2349). The House Report also emphasized that removing the phrase "upon receipt of a complete or substantially complete application" would "allow[] VA to put notice on new claims forms," and the Committee anticipated that the VA would then "move[] the * * * notice onto the application form itself." House Report 8-9.

b. In contending that the statute requires notice to be provided *after* an application is received, petitioner focuses on Section 5103's requirement that the Secretary give "notice of any information, and any medical or lay evidence, *not previously provided to the Secretary* that is necessary to substantiate the claim." 38 U.S.C. 5103(a)(1) (emphasis added); see Pet. 20-21. But that language does not speak to when the notice must be provided. Rather, it indicates that a veteran need not resubmit evidence the Secretary already has. That

clarification is significant because the VA claims process routinely involves situations in which claims are reopened after a prior denial, multiple claims are filed at or around the same time, or claims are filed for a service-connected disability that is linked to a prior disability. The notice petitioner received specifically explained that the "VA will * * * [r]etrieve relevant records from a Federal facility, such as a VA medical center, that [the claimant] adequately identif[ies] and authorize[s] VA to obtain." C.A. App. 91.

For the same reason, petitioner is mistaken in reading the "not previously provided" clause as implicitly requiring the VA to provide *individualized* notice of the additional evidence a particular veteran must submit after the agency has assessed that veteran's original benefits application. See Pet. 18. That argument contravenes the Federal Circuit's longstanding recognition that the statute requires only "generic" notice, rather than individualized notice based on a particular veteran's claims and prior submissions. See *Wilson*, 506 F.3d at 1058-1060. The Federal Circuit in *Wilson* reached that conclusion even though the version of Section 5103(a) in effect at that time directed the VA to provide notice "[u]pon receipt of a complete or substantially complete application." 38 U.S.C. 5103(a) (Supp. II 2008); see *Wilson*, 506 F.3d at 1058 (observing that, "[u]nder the plain language of the statute [in its then-current form], the notice obligation is triggered by the filing of a 'complete or substantially complete application'"); *id.* at 1059 (rejecting the veteran's argument that Section 5103(a) "requires specific notice of the missing evidence with respect to a particular claim"). The court thus recognized that, even when the VA provides notice about the benefits-application process to a

veteran who has *already* submitted a benefits claim, that notice need not be tailored to the individual veteran's circumstances.

When it amended Section 5103 in 2012, Congress did not disturb the Federal Circuit's understanding that the VA need not provide individualized notice tailored to a particular veteran's benefits application. To the contrary, Congress deleted the introductory phrase "[u]pon receipt of a complete or substantially complete application," and it added language requiring that the notice should be made "by the most effective means available." See 38 U.S.C. 5103(a)(1); pp. 2-3, *supra*. Congress also added language specifying that the VA need not provide notice "for a subsequent claim that is filed while a previous claim is pending," so long as the notice for the pending claim "provides sufficient notice of the information and evidence necessary to substantiate such subsequent claim" and was sent a year or less before the filing of the subsequent claim. 38 U.S.C. 5103(b)(4); see Honoring America's Veterans Act, § 504(a)(2), 126 Stat. 1191. That language further illustrates Congress's understanding that sufficient notice of the evidence necessary to substantiate a claim can be provided *before* a particular claim is filed and need not be tailored to a particular veteran's claims or to an analysis of the veteran's prior submissions.

3. The court of appeals held that, even if the VA's regulation required post-application notice, any error in providing petitioner notice too early was harmless. That holding was correct and does not warrant this Court's review.

a. The court of appeals held that petitioner had not identified any way in which he was injured by receiving the statutorily required notice *too early*, so long as that

notice adequately apprised him of the evidence required to substantiate his application. The fact that petitioner received the notice at the outset of the process, rather than after the VA received petitioner's application, did not "prevent[] him from collecting and submitting the evidence he had," or even "from filing a supplemental claim and asking the agency to gather evidence from other private providers." Pet. App. 11a; see 38 U.S.C. 5104C(a)(1)(B). Instead, after receiving the initial decision from the regional office, petitioner elected to have the Board conduct a "direct review" based upon the evidence already of record, rather than have the Board consider newly provided evidence. Pet. App. 35a; see 38 U.S.C. 7105(b)(3), 7113.

The Board ultimately determined that the VA-provided medical examination, conducted by a skilled neutral professional, credibly established that petitioner's "current left shoulder disability is not related to service." Pet. App. 40a. That conclusion was corroborated by petitioner's "June 1990 separation examination," his "March 1993 service examination," and petitioner's own statements "on his March 1993 report of medical history" just three years after his separation from service. *Ibid.* Petitioner contends that he "did not know when filing his claim that VA would commission a competing medical report, or that other forms of evidence could prove dispositive in the event his doctor and VA's doctor disagreed." Pet. 19. But whatever petitioner may have anticipated at the time he filed his claim, the regional office's decision gave him clear notice that the VA viewed the countervailing evidence as more credible and probative, and petitioner did not subsequently identify any additional evidence that he believed the agency should consider.

b. Petitioner invokes the principle that the government is bound by its own regulations. See Pet. 23-25 (citing *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954)). Contrary to petitioner's assertion (Pet. 25), however, that principle does not logically suggest that any failure by the VA to comply with 38 C.F.R. 3.159(b)(1) requires a remand for the provision of additional notice. To the contrary, the Veterans Court is required to "take due account of the rule of prejudicial error." 38 U.S.C. 7261(b)(2); see *Shinseki* v. *Sanders*, 556 U.S. 396, 399, 406 (2009); see also 28 U.S.C. 2111.

c. In finding that any VA deviation from the terms of its regulation was harmless, the court of appeals explained that "[t]he content of the notice [petitioner] received was sufficient as a matter of law"; that petitioner had "not explain[ed] why his claim application was impacted by *when* he received the notice"; and that "any error resulting from [petitioner] receiving the notice 'too early' cannot be prejudicial." Pet. App. 9a-10a. In challenging the court's harmless-error analysis, petitioner does not appear to argue that he would have benefited from receiving the *same* Notice Form *after* he submitted his benefits application rather than (or in addition to) receiving it along with the original application form. Rather, petitioner contends that any error here was prejudicial because, if the VA had provided post-claim notice, that notice would have been more tailored to his own individual circumstances and thus more helpful to him in substantiating his claim. See Pet. 25 (stating that, if the VA had "adhered to 38 C.F.R. § 3.159(b)(1), * * * [t]he agency would have notified [petitioner] that, even with his doctor's report in the record, older medical documents and buddy statements could prove necessary to establish service connection"); Pet. App. 10a

(describing petitioner's argument below "that, by providing the notice directly on the claim form, the agency was unable to 'review the application and accompanying evidence to determine what is missing, and issue a notice tailored to [respondent's] claim'") (brackets, citation, and ellipsis omitted). That argument depends on the premise that, to the extent the VA's regulation requires the agency to provide *post-claim* notice, it must likewise require the provision of notice tailored to the individual veteran's application.

The court of appeals correctly rejected that argument as inconsistent with longstanding Federal Circuit precedent. The court recognized that petitioner's complaint was not simply with the *timing* of the Notice Form that he had received, and that petitioner additionally sought a substantively different notice, *i.e.*, "an individualized notice tailored to his claim." Pet. App. 10a. The court explained, however, that the Federal Circuit had "squarely rejected that requirement in *Wilson*. There, we held that neither [38 U.S.C.] § 5103(a) or [38 C.F.R.] § 3.159(b) required the agency to provide an evidentiary notice tailored to each individual claim because the statute requires 'only generic notice.'" *Ibid.* (quoting *Wilson*, 506 F.3d at 1059-1060). As explained above, the *Wilson* court reached that conclusion even though the version of Section 5103(a) in effect at that time made a veteran's submission of a benefits application the trigger for the statutory notice requirement. See p. 12, *supra*. Petitioner's effort to read an individualized-notice requirement into 38 C.F.R. 3.159(b), and his contention that the VA's failure to provide such notice was prejudicial error, cannot be reconciled with that precedent.

The court of appeals concluded that, "because the agency did not have to provide [petitioner] with an individually tailored evidentiary notice, the notice that [petitioner] received was legally sufficient." Pet. App. 10a. Finding no error in the *substance* of the notice that petitioner had received, the court focused its harmless-error analysis on whether petitioner had been prejudiced by the *timing* of that notice. Based on its determination that Section 3.159(b) did not entitle petitioner to notice tailored to any perceived deficiencies in his original application, and in the absence of any ground for concluding that "there could have been prejudicial error resulting from [petitioner] receiving the notice too early," the court correctly held "that any error resulting from receiving the notice as part of the claim application form was harmless." *Id.* at 11a.

d. Petitioner also contends that the instructions in the "notice letter VA previously sent to claimants" until 2015 would have been more helpful than the Notice Form the agency currently uses. Pet. 29; see Pet. 7-8. But petitioner has not identified a meaningful difference between the prior instruction to send the VA all "treatment records," Pet. 30 (citation omitted), and the instruction petitioner received that a claim can be supported by "medical records or medical opinions" that establish that "[a] relationship exists between your current disability and an injury, disease, symptoms, or event in service." C.A. App. 92. The likelihood that petitioner was prejudiced by any discrepancy between the two documents is particularly slim because petitioner *did* submit a private medical report in support of his claim. See Pet. App. 3a. And whereas the prior notice letter had invited veterans to submit "statements from people who have witnessed how your claimed disabilities

are related to service and/or how such disabilities affect you," Pet. 30 (citation omitted), the Notice Form petitioner received likewise told veterans that a claim for service connection could be supported by "lay evidence." C.A. App. 92.

In any event, petitioner does not contend that the VA's pre-2015 practice was to send each veteran an *individualized* notice tailored to the perceived deficiencies in that veteran's original benefits application. And nothing in the governing statute or regulation requires the VA to use petitioner's preferred language from the prior notice letter rather than the formulation the VA uses on the current Notice Form. Petitioner's comparison between the agency's pre- and post-2015 practices therefore raises no significant legal issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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