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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER

ON BEHALF OF THE PETITIONER

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

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

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

Second, a notice error of the kind at issue

1 here does not --

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. MILLER: No, the statute at issue here
7 is the Veterans Judicial Review Act of 1988. So the
8 relevant time we are looking at what the practice was is
9 as of 1988 when Congress incorporated the language from
10 the APA and placed it into section 7261. And as of
11 1988, it was clear that the burden was on the
12 challengers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 know if it was harmful or not, here's what you do:

2 Assume it was harmful. They're the ones who know. I
3 don't know.

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

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

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

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

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

3 JUSTICE STEVENS: What was the error?

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

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

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

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

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

1 courts below, it clearly wasn't.

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

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

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

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

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

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

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

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

25 MR. MILLER: It's certainly that.

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

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

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

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

4 JUSTICE STEVENS: But not during the nisi
5 prius proceeding.

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

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

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

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

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

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

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

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

20 JUSTICE SOUTER: With new evidence?

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

1 review is de novo.

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

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

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

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

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

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

1 except for the --

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

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

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

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

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

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

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

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

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

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

1 it back to the regional office for further development.

2 If I could reserve the remainder of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.

4 Miller.

5 Mr. Meade.

6 ORAL ARGUMENT OF CHRISTOPHER J. MEADE

7 ON BEHALF OF RESPONDENT SIMMONS

8 MR. MEADE: Mr. Chief Justice, and may it

9 please the Court:

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

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

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

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

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

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

25 JUSTICE ALITO: What if you have the

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

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

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

23 In addition, veterans often are not --

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

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

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

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

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

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

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

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

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

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

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

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

19 JUSTICE KENNEDY: Is there usually an
20 initial hearing?

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

23 JUSTICE KENNEDY: Okay.

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

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

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

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

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

1 with anything, or she can come up with something.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.
7 Meade.

8 Mr. Lippman.

9 ORAL ARGUMENT OF MARK R. LIPPMAN
10 ON BEHALF OF THE RESPONDENT SANDERS

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

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

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

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

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

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

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

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

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

24 MR. LIPPMAN: Correct.

25 JUSTICE GINSBURG: So Justice -- the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 And I think --

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

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

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

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

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

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

7 So that's the beauty --

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

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

19 MR. LIPPMAN: Well --

20 JUSTICE BREYER: That doesn't seem --

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

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

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

2 MR. LIPPMAN: Correct.

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

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

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

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

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

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

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

7 MR. LIPPMAN: How --

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

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

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

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

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

3 CHIEF JUSTICE ROBERTS: Uh-hmm.

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

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

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

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

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

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

11 MR. LIPPMAN: Well --

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

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

25 The fourth one was engrafted upon it because

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

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

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

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

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

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

15 MR. LIPPMAN: Right.

16 JUSTICE KENNEDY: That's fairly
17 straightforward.

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

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MR. LIPPMAN: Thank you.

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

25 REBUTTAL ARGUMENT OF ERIC D. MILLER

1 ON BEHALF OF THE PETITIONER

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

3 I would like to make just three points.

4 First, on the question of what is provided to the
5 claimant after the denial in the regional office.
6 Before they get to the Board of Veterans Appeals, the
7 regional office issued them a statement of the case, and
8 that's described at 38 C.F.R. 19.29, and that regulation
9 has fairly detailed requirements about what has to be in
10 there in terms of a description of the evidence, the
11 description of the applicable laws and regulations and
12 analysis of the board's conclusions, or the regional
13 office's conclusions and its application of the law to
14 the evidence.

15 The second point --

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

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

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

25 MR. MILLER: No. Once they file the notice

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

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

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

12 JUSTICE SOUTER: Well --

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

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

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

21 MR. MILLER: Correct.

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

1 lawyer?

2 MR. MILLER: Yes.

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

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

21 MR. MILLER: I think --

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

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

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

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

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

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

1 MR. MILLER: Allowed to retain counsel.

2 CHIEF JUSTICE ROBERTS: You can finish

3 your --

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

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

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

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