Hey, Department of Veterans Affairs: Notice This

By Douglas J. Rosinski

One frustration of representing veterans seeking benefits from the Department of Veterans Affairs (VA) is the number of cases involving some aspect of the fundamental issue of notice. Whether the notice comes from the VA to the claimant or the notice comes from a claimant to the agency or the Court of Appeals for Veterans Claims (CAVC), failure to provide proper notice vexes the entire veterans' benefits system. Even though the bases for myriad notice rules are forever lost in the fog of agency history, one stark reality cannot be avoided: notice errors invariably have an adverse effect on claimants.

Sitting in the catbird seat, the VA has done little, if anything, to improve the situation. To the contrary, secretaries of veterans affairs of every stripe have staunchly opposed anything other than strict compliance on the part of claimants and disavowed any responsibility to correct obvious errors made by claimants when they attempt to comply with the rules. The CAVC, for its part, has strictly interpreted notice requirements and liberally applied the "presumption of regularity" to fill the huge gaps left by the secretary's refusal to implement any method of accountability for transmittal of notices.

This article is stimulated by recent federal court decisions requiring the Department of the Treasury and the

Social Security Administration to implement enhanced notice methods in compliance with the Rehabilitation Act of 1973. It turns out that the act requires the VA to do more than shrug its shoulders when providing confusing notice of legal rights to claimants.

Pay Attention or Pay the Piper

The VA not only awards benefits but also can—and should—reduce benefits when a claimant demonstrates an improvement in the condition for which he or she previously received benefits. *See* 38 C.F.R. §§ 3.500-3.505. When a reduction appears appropriate, the VA is required to provide the claimant notice of the proposed reduction—usually by a letter from the claimant's regional office. Such a notice includes two important pieces of information: (1) notice of the claimant's right to a personal hearing, 38 C.F.R. § 3.103(b)(4) and (2) notice that additional evidence can be submitted. *Id.* § 3.103(b)(2). Invoking the right to a personal hearing has the additional benefit of requiring the VA to *continue payments at the existing rate* until the hearing is held and a decision is reached. The notice also informs a claimant that he or she has 30 days to submit a request for a hearing and 60 days to submit additional evidence. One might think this procedure is fairly straightforward. That is not the case, however.

The notice of proposed reduction in benefits is generally several pages long. In every case of which the author is aware, the VA has placed the 60-day requirement on the *first page* and buried the 30-day requirement on the second or subsequent page.[1] Not only is the order of deadlines counterintuitive, it also provides a dose of reality to claimants who believe that they have "appealed" the proposed reduction by sending in correspondence within 60 days when they receive a greatly reduced payment without further warning. To my knowledge, the secretary has provided no justification for this "hide-the-ball" technique. Perhaps the VA has done so because the purpose is so obvious.

Can You Read Me Now?

At least the text of the notice of proposed reduction in benefits is prepared in standard-sized type (apparently 12-point type). Again, one would think that a document providing notice of information critical to perfecting an appeal and protecting a claimant's rights would be clear and presented in an easily readable format. But this is not the case.

The official two-page notice of a claimant's appellate rights—VA Form 4597: Your Rights to Appeal Our Decision (published in August 2009)—which is sent along with a notice of an unfavorable decision reached by the Board of Veterans' Appeals, is produced in what appears to be 8-point type with margins that are approximately a half-inch wide. The guidance begins optimistically in the second paragraph of the form, where the claimant is advised that "if you are satisfied with the outcome of your appeal, you do not need to do anything." The VA then provides a bulleted list of five options available to claimants who are not satisfied with the decision: (1) an appeal to the CAVC, (2) a motion for reconsideration by the board, (3) a motion to vacate the board's decision, (4) a motion for revision based on clear and unmistakable error, and (5) a reopening of the claim. The following statement immediately follows the list of options. However, the statement on page 1 of VA Form 4597 appears in much smaller (8 point) type:

> There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the VA local office. None of these things is mutually exclusive—you can do all five things at the same time if you wish. (Emphasis in the original.)

So did you catch it? Be honest, did your legally trained eye actually catch that the list of actions for which there is "no time limit for filing" contained only *four* items? If it did, congratulations, you can now proceed to the next challenge to your constitutionally protected right of due process. If you did not catch the problem, sandwiching that four-item list in a sentence between a five-item bulleted list and a sentence that states "you can do all *five* things at the same time" obviously was not very helpful. So now you need to return to the regional office, file another claim, and ride the hamster wheel again while forfeiting all retroactive payments. This is what passes in the VA world for full satisfaction of the statutory requirement that the notice of appellate rights "include an explanation of the procedure for obtaining review of the decision." *Pittman v. Brown*, 9 Vet. App. 60, 65 (1996) (citing 38 U.S.C. § 5104(a)).

As to when and how to file a notice of appeal, if a claimant has not already thrown the form aside because he or she believes that there is "no time limit," the claimant will finally find the information on the bottom half of the first page. In addition to a statement (finally) revealing the 120-day filing deadline, the following appears on VA Form 4597 in the type size printed here:

> **How do I appeal to the United States Court of Appeals for Veterans Claims?** Send your Notice of Appeal to the Court at:
> **Clerk, U.S. Court for Appeals for Veterans Claims**
> **625 Indiana Avenue, NW, Suite 900**
> **Washington, DC 20004-2950**

Thus, the notice to claimants who have been submitting documents to their regional office or the board for years—if not decades—is squirreled away the same way the disclosure requirement in a no-money-down mortgage application is. Because the court has repeatedly held that receipt *by the court* and not the VA is a jurisdictional requirement, claimants' appeals are routinely dismissed because of misfiled notices of appeals.[2]

There is no need for such "Where's Waldo?" gamesmanship. As observed nearly a decade ago, when the VA wants *your* money, the Debt Management Center sends a pre-addressed, detachable form in which the required information to process a payment is already filled in. *See* "The Sixth Judicial Conference of the United States Court

of Appeals for Veterans Claims," 15 Vet. App. CXXII (2000) (statement of Keith Snyder). A valid notice of appeal containing all the required information—the claimant's name and contact information, a statement expressing an intent to appeal, identification of the decision that is being appealed, and the mailing date of the decision—could be prepared and sent with the notice of the board's decision, along with a pre-addressed envelope. Once again, the author is unaware of any reasonable explanation for the VA's intransigence in improving this particularly significant notice and making it easier for claimants to submit a valid notice of appeal properly.

Economies of Mail

Of course, most of the notices in cases involving veterans' benefits are sent to the claimant by the VA, informing him or her of any of a myriad duties that have to be accomplished, such as filing an appeal or attending a scheduled medical examination, usually within some short period of time. The penalty for failing to perform many of these tasks in accordance with the notice can be denial of the claim or dismissal of the appeal. One would think that, given the importance of these notices to the claimant, the VA would at least try to keep good records of the notices and responses. Again, this is not the case.

On Jan. 15, 2010, the Court of Appeals for Veterans Claims issued its decision in *Kyhn v. Shinseki*, 23 Vet. App. 335 (2010), in which the court affirmed the board's denial of Kyhn's claim. The basis for the court's decision was Kyhn's failure to report for a medical examination of which there was no evidence "that VA [had] mailed notice to him of his scheduled 'examination.'" *Id.* at 338. Lacking any evidence that the VA had actually sent the notice, the CAVC relied entirely on a legal construct known as the "presumption of regularity under which it is presumed that government officials 'have properly discharged their official duties.'" *Id.*

The CAVC explicitly asked the secretary to produce evidence that the department had sent a notice to Kyhn, but the secretary was unable to provide the evidence. Instead, all the VA could do was to produce a copy of a letter that had been generated by computer more than three years later. Accepting the secretary's representation that a similar letter *should have* been sent to Kyhn in 2006, the CAVC found that

> [B]ecause the evidence that the RO [regional office] followed its procedure for requesting and scheduling a medical examination and because the examination cancellation notice stated that the notification of the examination was mailed to the veteran at his address *it may be presumed* that the VAMC [VA Medical Center] electronically generated and *mailed Mr. Kyhn notice* of the scheduled examination at his address of record.

Id. at 339 (emphases added). In short, the court (1) *presumed* that the VA had sent an appointment notice and (2) *assumed* that the veteran had ignored it—without evidence of either. Thus, a veteran can be denied a constitutionally protected right because the VA is assumed to have performed whatever action it *should have* performed. As a practical matter, therefore, actual provision of notice is no longer required. It makes perfect sense, therefore, for the secretary to forgo any administrative tracking system, because such systems contain messy evidence of missed or late notices that could be held against the VA.[3] There is clearly no benefit to accountability when a presumption that cannot be rebutted effectively ensures a perfect record of performance without the expense of actually preparing and mailing all those letters. How does a veteran prove that he or she did not receive a letter?

An Oldie but a Goodie

Recent federal court decisions require the Department of the Treasury and the Social Security Administration to implement enhanced methods of communicating information, including legal notices, in compliance with the Rehabilitation Act of 1973, as amended:

> No otherwise qualified individual with a disability in the United States, as defined in section 706 (20) of this title, shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (implementing § 504 of the act). The VA's regulations related to implementing the act contain substantially the same requirement and explicitly address requirements for communications with claimants. *See* 38 C.F.R. §§ 15.130(a) and § 15.160(a). The VA's implementation of the act, however, appears to fall far short of the courts' interpretation of the requirements listed in the act.

A fair reading of § 504 and recent cases underscore that the VA's current practice of almost exclusive reliance on standard print correspondence by regular mail to provide notices and other information to its claimants is not sufficient to satisfy the statute. *See American Council of the Blind v. Paulson*, 525 F.3d 1256 (D.C. Cir. 2008) (affirming order that the Treasury Department design paper currency distinguishable to the visually impaired); *American Council of the Blind v. Astrue*, "Findings of Fact and Conclusions of Law After Bench Trial," No. 05-cv-04696 (N.D. Cal. Oct. 20, 2009) (ordering alternative methods of communications to the visually impaired). Both of these cases make clear that federal agencies, including the VA, are subject to the requirements listed in § 504 of the act. The *Astrue* court rejected the Social Security Administration's assertions of undue burden on the agency and further found that federal agencies must provide *adequate alternative modes of communications* to meet their duties under § 504. *Astrue* at 35, 38–41.

To this end, the *Astrue* court explicitly found that "the pervasive use of standard print only is the obstacle imped-

ing [claimants'] access." *Astrue* ¶ 110. "Where [claimants] identify an obstacle that impedes their access to a government program or benefit, they likely have established that they lack meaningful access to the program or benefit." *Paulson,* 525 F.3d at 1267. The *Astrue* court also found that a federal agency is "obligated by the [act] to provide special services to blind recipients without regard to whether blindness is the basis for their benefits." *Astrue* at 2.

In contrast to the VA's antiquated, questionable, and unaccountable notice practices, as of April 15, 2010, the Social Security Administration is required to "automatically grant requests for the [communication] formats listed below:"

1. Standard print notice by first class mail or *certified mail*; or
2. Standard print notice by first class mail and a *follow-up telephone call to read the notices* to you within five business days of the date you get the print notice; or
3. Standard print notice and *Braille* by first class mail; or
4. Standard print notice and a Microsoft Word *compact disc* by first class mail. The compact disc may be used on a computer that has the software needed to access Word.

"Class Notice in *American Council of the Blind*" (emphasis added).[4] It is not clear why the VA could not implement the same methods.

In any event, it is unreasonable to contend that the VA's current policies and procedures for communicating with claimants are consistent with the Rehabilitation Act. The earlier examples of the VA's current methods of communication establish that changes are needed to address the notice issues that plague the department. In addition to the cases similar to *Kyhn,* it is clear that claimants who *do* receive correspondence from the VA fail to recognize or understand the information in that correspondence. *See, e.g., Posey*, 2010 WL 1634067 at *5 (listing 11 examples of misfiled Notices of Appeal, resulting in dismissals). The secretary's position that equitable tolling does not apply to any response under any circumstances further exacerbates the situation and emphasizes the importance of adequate notice for all claimants—not just those claimants with conditions that affect their ability to comply with or respond to department communications. *See, e.g., Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009 (en banc), *petition for cert. filed* Feb. 24, 2010 (U.S. No. 09-1036).

Moreover, there appears to be no basis for limiting the scope of the Rehabilitation Act to only the visually impaired. To the contrary, the act's plain language requires the VA to remove impediments to communications to claimants suffering *any* condition that impedes their ability to recognize and react to communications affecting their claims. Indeed, the overall improvements in notices arising from compliance with the act are likely to have a positive impact on the efficiency of the VA's entire claims system because of more timely and appropriate responses, fewer misfiled documents, and the elimination of appeals generated by misinformed claimants. Changes to comply with the Rehabilitation Act would thus have a very positive impact on veterans separate and apart from mere compliance with federal law.

Broad compliance with the requirements of the Rehabilitation Act, therefore, is fully consistent with the VA management's new "do it right the first time" philosophy. As a result, the VA should welcome and place a high priority on the following recommended steps:

- immediate development of interim procedures for notifying each claimant of his or her right to request a preferred format to receive VA notices and other information;
- identification of additional information formats to be offered to claimants;
- development and implementation of interim procedures for the above; and
- initiation of formal rulemaking to update the department's regulations regarding the requirements.

As the *Astrue* court's discussion and the subsequent settlement with the Social Security Administration illustrate, it is in everyone's interest for the Department of Veterans Affairs to voluntarily implement the act's long-standing—albeit largely ignored—requirements regarding adequate notice to claimants. It is certainly our sincere hope and expectation that the department will act promptly to do so.

Who? Us?

A Feb. 24, 2010, letter to the secretary raised the issue of compliance with the Rehabilitation Act in light of recent court decisions. On March 26, 2010, the general counsel of the VA responded on behalf of the secretary, stating the following: "The Department is fully committed to complying with the requirements of Section 504 and recent court decisions. To that end, the Department is exploring the feasibility of partnering with the American Council of the Blind to discuss ways to best address the issues outlined in your February 24th correspondence. We will also be reviewing best practices that are currently in place within other federal agencies." Letter from W. Gunn to D. Rosinski, Rehabilitation Act Requirements for Department Notices (Mar. 26, 2010). Whether or not "exploring the feasibility of partnering" to "discuss ways to best address the issues" means that the VA will begin to comply with the act remains to be seen, because, as of the date this article was written, nothing more has been heard on the issue.

In any event, veterans who submit claims to the Department of Veterans Affairs suffer from many more conditions that affect their ability to understand the convoluted mix of forms, form letters, and boilerplate text that constitute notices provided by the VA. Whether or not the VA's exploration of the "feasibility of partnering" to address the problems of those with impaired vision works out, the department has a clear and defined mandate to be

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responsive to the entire spectrum of its claimants and to provide adequate, clear, and consistent notice to them regarding their claims for benefits. The secretary of veterans affairs is legally required to act quickly and without further prompting for the benefit of his constituency. **TFL**

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Endnotes

[1]Perhaps we should be content that the 30-day limit is even noted because, even though the VA procedure for preparing such letters repeatedly refers to the "60-day period," nowhere is the 30-day period mentioned, much less designated a required element. M21-1MR, part I, chap. 2, sec. B.5.

[2]As noted by the CAVC with increasing alarm, a Notice of Appeal misfiled with the VA has a remarkable chance of being forwarded to the court *a week or two after* the jurisdictional time limit for filings has run. *See, e.g.*, *Posey v. Shinseki*, 2010 WL 1634067 (Vet. App. Apr. 23, 2010) at *5 (listing 11 examples of suspiciously delayed forwarding of notices of appeal resulting in dismissal of the appeal).

[3]That would be the case, unless the VA adopts the practice of its New York regional office and simply enters false dates into the system. *See* Statement of Belinda J. Finn Assistant Inspector General For Auditing Office of Inspector General Department of Veterans Affairs Before the Subcommittee on Disability Assistance and Memorial Affairs and the Subcommittee on Oversight and Investigations Committee on Veterans' Affairs, U.S. House of Representatives Hearing on Document Tampering And Mishandling at the U.S. Department of Veterans Affairs at 9 (Mar. 3, 2009). The inspector general's investigation concluded that the management of the New York regional office of the VA had instructed staff to intentionally establish erroneous receipt dates of claims, and staff did so for 220 (56 percent) of 390 claims reviewed and had been establishing erroneous dates for a number of years.

[4]Available at www.socialsecurity.gov/notices/ACBNotice.htm.